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Race Relations Law Reporter

**A Complete, Impartial
Presentation of Basic
Materials, Including:**

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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Recent Developments ... A Summary

Education

Recent *Alabama* legislation authorizes public assistance to citizens obtaining instruction at private non-denominational institutions when instruction is unavailable at public institutions (p. 1056).

Arkansas legislation providing procedures whereby a county may constitute itself a "County Equalizing School District," electors of which could vote to allocate to it revenues of regular school districts therein for redistribution to equalize educational opportunities (p. 1053), was declared violative of the state constitution by the state supreme court (p. 855).

The Fifth Circuit Court of Appeals held the *Florida* Pupil Assignment Act and an implementing Dade County school board resolution insufficient as a desegregation plan and suggested that the board submit a plan without defects noted in the other arrangement (p. 859). But a federal district court dismissed a suit to desegregate Hillsborough County schools for failure of plaintiffs to exhaust remedies under the assignment act (p. 863). Also, a state circuit court invalidated a Lake County school district's bonds because of the local board's expressed intention to continue school segregation (p. 891).

A federal district court refused relief to Durham, *North Carolina*, Negro children whose applications for reassignment to non-segregated schools had been denied, because they had not exhausted remedies under the state pupil assignment act and because their class suit for a general desegregation order was inappropriate for asserting their rights (p. 864).

Rutherford County, *Tennessee*, school officials were enjoined by federal district court from excluding children of Negro military personnel from a previously all-white school adjacent to an Air Force installation (p. 874). Consideration of a suit by Memphis Negroes to enjoin enforcement of a state board of education resolution denying their immediate admission to a state university was postponed by a federal district

court because the case might become moot since state officials had indicated that qualified Negroes would be admitted at the next term. (p. 888).

In *Texas*, a federal district court refused to order immediate desegregation of Dallas County schools or to set a definite date therefor, but stated that school officials should take steps toward desegregation, including calling an election as provided by state legislation (p. 877).

Arlington County, *Virginia*, school officials were enjoined by a federal district court from refusing to admit seven Negro children to desegregated schools; but a hearing as to nine others was postponed (p. 880). Charlottesville school officials submitted a desegregation plan to another district court, which approved the plan and directed that a previous order requiring admission of twelve Negro children to white schools be carried out (p. 881).

Civil Rights

In cases brought in federal district courts in *Alabama* (p. 928), *California* (pp. 917, 918, 920), *Georgia* (p. 923), *Indiana* (p. 903), *Illinois* (pp. 918, 919, 924), *New York* (p. 923), *Ohio* (p. 900), *Oklahoma* (p. 901), and *Texas* (p. 902), in which the federal Civil Rights Act was invoked, decisions adverse to the various plaintiffs were rendered because of common law judicial immunity for acts officially taken by certain officers, of failure to allege action under color of state law or conspiracy to discriminate against or otherwise deprive members of a class of constitutionally guaranteed rights, and of failure to aver facts sufficient to support allegations of Act violations so as to state a cause of action thereunder.

However, the Civil Rights Act was successfully invoked in federal cases arising in *Oregon*. The Ninth Circuit Court of Appeals held that allegations that named defendants had purposely and systematically discriminated against a plaintiff through described overt acts, "under color and pretense" of cited state statutes and

"in furtherance of the conspiracy" to deprive him of constitutional rights in violation of the Act was sufficient to state a cause of action. It also refused to recognize a blanket immunity in state officials for all acts committed within the ostensible scope of their authority (p. 903). Subsequently, in another case, the district court held that under the Civil Rights Act prisoners in the state penitentiary, as a part of their basic right to access to the courts, must be allowed to have adequate access to legal materials, to have legal documents in their cells, and to receive without unnecessary delay communications that come from their attorneys (p. 925).

Governmental Facilities

A federal district court held unconstitutional both a Montgomery, *Alabama*, ordinance and city officials' practice, custom, and usage of requiring racial segregation of city parks; and, taking notice of action by city officials closing city parks, the court enjoined future segregated operation of the parks (p. 977).

In a suit by Jacksonville, *Florida*, taxpayers to enjoin sale of municipal golf courses, previously closed in the face of a federal court injunction prohibiting racially discriminatory operation, a state court held that the city, not being compelled to operate such facilities, could dispose of them even at less than their appraised value and on condition that they be used only as golf courses, although a higher price could have been obtained by an unrestricted sale (p. 973). The Miami City Commission instructed the city manager to countermand a directive authorizing the admission of Negroes into public pools (p. 1066).

The *Michigan* Supreme Court affirmed a lower court decision which voided a testamentary bequest of funds to Detroit "for a playground for white children," because to effectuate it the city would have to violate state laws and the Fourteenth Amendment. The court refused to apply the cy pres doctrine to allow the city to use proceeds to establish a playground for all races because contrary to the will's words of command (p. 981).

A suit by Negro citizens of Greensboro, *North Carolina*, against the city and a private corporation alleging that the corporation's purchase of a city swimming pool was not bona fide and

praying that defendants be enjoined from a segregated operation thereof was dismissed by a federal district court, which held that the sale had been made in good faith although the corporation had previously announced that it would operate the pool exclusively for white citizens and although the corporation's president was also a city official, the city not having attempted to get any such advance commitment from bidders nor to influence the pool's operation subsequently (p. 988).

A federal district court in *South Carolina* denied relief to a Negro whose complaint under the federal civil rights statute alleged that as an interstate traveller he had been ordered to use a racially segregated waiting room, holding that the assertion of racial discrimination was not based on facts warranting such inference and that he had not alleged that any right had been denied him by acts done under color of state law (p. 967).

Transportation

Birmingham, *Alabama*, Negroes, who had refused to comply with segregated seating signs on a city-franchised, privately-owned transit company bus and had been thereafter arrested and convicted under an ordinance authorizing public carriers to regulate seating and making a "wilful refusal to obey a reasonable request of an operator" concerning seating a breach of the peace, alleged in a federal court suit that the ordinance had been applied in denial of their rights under the federal constitution and civil rights statutes; but the court dismissed the suit against the company, because it had acted only as a private person, and held that plaintiffs had not shown that the city commissioners had formed any policy to apply the ordinance in a racially discriminatory manner (p. 1027).

The *Virginia* Supreme Court of Appeals refused to review the conviction of a Negro for trespassing upon a bus company's premises in violation of a statute forbidding one to remain without legal authority upon another's premises after having been forbidden to do so, it appearing that as an interstate bus passenger he had refused to leave a terminal restaurant where he had sought refreshment at a regularly scheduled stop (p. 1012).

Trial Procedure

The *Colorado* Supreme Court reversed the conviction of a person with a Spanish-sounding surname, holding that the evidence established a *prima facie* case of systematic exclusion of persons with Spanish-sounding surnames from juries in the county (p. 1046).

The Seventh Circuit Court of Appeals, in affirming the conviction by a district court in *Illinois* of a Negro of crimes committed on a federal reservation, held that the trial court had properly refused to instruct the jury to consider the prisoner's case as if he were white, since color prejudice inquiries should have been made at the *voir dire* examination of jurors (p. 1042). Affirming the conviction of a Negro who contended that the prosecutor's use of peremptory challenges had resulted in a systematic exclusion of Negroes from his jury, the *Illinois* Supreme Court held that such a practice would not be a violation of appellant's constitutional rights because such challenges may be exercised according to the judgment or caprice of the party entitled thereto (p. 1048).

The Tenth Circuit Court of Appeals affirmed a district court dismissal of a federal prisoner's petition for habeas corpus based on the claim that his trial, while abroad in the Army, for rape and murder in violation of the military code, had been conducted in an atmosphere of racial prejudice; grounds for the dismissal were petitioner's failure to raise the issue in the military courts and lack of evidence of deprivation of a fair trial (p. 1039).

Voting

Action of a federal district court in *Alabama* dismissing a complaint by Negroes which challenged a statute redrawing Tuskegee's municipal boundaries so as to remove therefrom all but a few Negro, but no qualified white voters, was affirmed by the Fifth Circuit Court of Appeals, which held that the legislature's sovereign

power so to act was reserved by the Tenth Amendment (p. 993).

A three-judge district court enjoined the United States Civil Rights Commission from holding scheduled hearings in Shreveport, *Louisiana*, on alleged deprivation of voting rights, because, although the Act creating the Commission was upheld, the court found no authority therein for the Commission to refuse to inform subpoenaed persons of the nature and source of accusations against them, or to refuse them rights of cross-examination and confrontation (p. 935). Contrary to a recent decision by a federal district court in Georgia [see 4 *Race Rel. L. Rep.* 314 (1959)] a district court in *Louisiana* held that the Civil Rights Act of 1957, merely because it might be interpreted in some other case so broadly as to cover suits against individuals for actions taken in their private capacities, is not unconstitutional as applied to defendants who had allegedly acted under color of state law in depriving citizens of voting rights for racial reasons (p. 962). In a third case, a district court dismissed an action against St. Landry Parish voter registrars, holding that individuals do not have a constitutional right to have federal courts interpret and enforce, under the Civil Rights Act, state registration laws as federal laws adopted by Article I, Section 2, and the Seventeenth Amendment (p. 956).

Miscellaneous

Massachusetts' "Lord's day law" was declared unconstitutional under the First and Fourteenth Amendments by a federal district court (p. 1016).

The *Michigan* FEPC, finding that in violation of the state fair employment act, the Detroit water department had discharged a Negro employee in retaliation for his having previously filed a complaint with the FEPC alleging a racially discriminatory practice by the employer, ordered reinstatement and payment of lost compensation (p. 1069).

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Appeal dismissed:

Stuart v. Wilson (Prior decision _____ F.Supp. _____, 4 Race Rel. L. Rep. 902 *infra* [N.D. Tex. 1959]. No. 495, January 11, 1960, 80 S.Ct. 368, order: "PER CURIAM. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

Probable jurisdiction on appeal noted:

Shelton v. McKinley (Prior decision 174 F.Supp. 351, 4 Race Rel. L. Rep. 694 [E.D. Ark. 1959] upholding an Arkansas statute prohibiting the employment of a person as a public school teacher or administrator in the absence of an affidavit listing his organizational affiliations, but holding unconstitutional another making NAACP membership a ground for dismissal or declaration of ineligibility for public employment). No. 541, January 25, 1960, 80 S.Ct. 401.

Denied petition for rehearing:

Ginsburg v. Stern (Prior decision 80 S.Ct. 59, 4 Race Rel. L. Rep. 539 [1959] in which the United States Supreme Court denied certiorari). No. 118, November 16, 1959, 80 S.Ct. 194.

Granted certiorari (i.e., agreed to review):

Boynton v. Commonwealth of Virginia (Prior decision Refused Case No. 4668, 4 Race Rel. L. Rep. 1012, *infra* [Va. Supreme Court of Appeals, 1959]). No. 409, February 23, 1960, 28 L.W. 3245.

Thompson v. City of Louisville (Prior decision [Louisville, Ky., Police Court, 1959] holding that evidence adduced by arresting officer required conviction of Negro for misdemeanors of loitering and disorderly conduct, against defendant's contentions that: convictions constituted arbitrary official action unsupported by evidence; Kentucky fails to provide corrective judicial process whereby federal constitutional objections to such convictions can be adjudicated; convictions denied defendant all possibility of effective redress against illegal and arbitrary arrests; and foreclosure of effective redress against arrests made in reprisal for defendant's insistence on federally protected rights to retain counsel and demand trial on earlier misde-

meanor charge infringes rights to counsel and judicial hearing, all in violation of Fourteenth Amendment due process clause). No. 59 (1958-1959 Docket No. 884), June 22, 1959, 27 L. W. 3362.

United States ex rel. Foret v. Sigler (Prior decision 267 F.2d 307, 4 Race Rel. L. Rep. 727 [5th Cir. 1959] in affirming decision discharging writ of habeas corpus sought by two Negroes convicted and sentenced to death by a Louisiana state court on a charge of raping a white female, declining to hold that defendants had been denied due process of law). No. 307 Misc., January 25, 1960, 80 S.Ct. 404, order: "PER CURIAM. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case remanded to the District Court for disposition of the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution." Other decisions: 225 La. 1040, 74 So.2d 207 (1954); 226 La. 201, 75 So.2d 333 (1954); 1 Race Rel. L. Rep. 23 (1955); 355 U.S. 60 (1957); 3 Race Rel. L. Rep. 1033 (1958).

United States v. State of Alabama (Prior decision 267 F.2d 808, 4 Race Rel. L. Rep. 624 [5th Cir. 1959]; docketed 28 L.W. 3080, 4 Race Rel. L. Rep. 541). No. 398, November 16, 1959, 80 S.Ct. 196.

Denied certiorari (i.e., declined to review):

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Bailey v. Henslee (Prior decision 264 F.2d 744 [8th Cir. 1959] affirming denial of habeas corpus to a Negro convicted in an Arkansas state court of rape because, even if trial court ruling (on petitioner's motion to quash the petit jury panel) denying him compulsory process for production of jury commissioners as witnesses relative to alleged systematic exclusion of Negroes from the panel was a technical denial of a constitutional right, he had deliberately omitted urging the question either in his motion for a new trial or on appeal and thereby waived the constitutional right and failed to exhaust his state remedies). No. 167 Misc., January 18, 1960, 80 S.Ct. 408, order: "Petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied without prejudice to a further application for writ of habeas corpus in the appropriate United States District Court, on the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels in violation of the Federal Constitution." Other decisions: 2 Race Rel. L. Rep. 997, 1097 (1957); 3 Race Rel. L. Rep. 758, 868 (1958); 4 Race Rel. L. Rep. 170 (1958).

Barnes v. City of Gadsden, Alabama (Prior decision 268 F.2d 593, 4 Race Rel. L. Rep. 647 [5th Cir. 1959]; docketed 28 L.W. 3136, 4 Race Rel. L. Rep. 540). No. 499, December 7, 1959, 80 S.Ct. 261.

Bartlett v. Weimar (Prior decision 268 F.2d 860, 4 Race Rel. L. Rep. 903, *infra* [7th Cir. 1959]). No. 351 Misc., January 11, 1960, 80 S.Ct. 380.

Brasier v. City of Tulsa (Prior decision 268 F.2d 558, 4 Race Rel. L. Rep. 901, *infra* [10th Cir. 1959]). No. 634, February 23, 1960, 28 L.W. 3246.

Brooks v. School District of the City of Moberly, Missouri (Prior decision 267 F.2d 733, 4 Race Rel. L. Rep. 613 [8th Cir. 1959]; docketed 28 L.W. 3080, 4 Race Rel. L. Rep. 540). No. 402, November 16, 1959, 80 S.Ct. 196.

Cole v. North Carolina (Prior decision 249 N.C. 733, 107 S.E.2d 732, 4 Race Rel. L. Rep. 308 [N.C. Supreme Court, 1959] holding, as to two officers of the North Carolina Ku Klux Klan convicted of inciting to riot for having conducted a rally, in a locality where Indians were known to be restive, which resulted in numerous gunshots and the wounding of two persons,

that there was sufficient evidence of the offense to carry the case to the jury but ordering a new trial for one of the two because certain evidence, inadmissible against him, was allowed to come in at the original trial). No. 185 Misc., October 19, 1959, 80 S.Ct. 128. Another decision: 3 Race Rel. L. Rep. 665 (1958).

Dickson v. Carmen (Prior decision 270 F.2d 809, 4 Race Rel. L. Rep. 935, *infra* [9th Cir. 1959]). No. 562, January 11, 1960, 80 S.Ct. 375. Rehearing denied, February 23, 1960, 28 L.W. 3246.

Grove v. Smyth (Prior decision 169 F.Supp. 852, 4 Race Rel. L. Rep. 311 [E.D. Va. 1958] dismissing an action for "Declaratory Relief" brought by an inmate against the superintendent of a state penitentiary, in which the plaintiff alleged that contrary to the Fourteenth Amendment and the Civil Rights Act he had been denied permission to order a lawbook from which he might acquire knowledge useful in testing the validity of his detention, the federal courts having no power over such matters within the internal jurisdiction of state prison officials and plaintiff not having sought relief in state courts from the state order under which he had been imprisoned). No. 452 Misc., January 11, 1960, 80 S.Ct. 383 order: "Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied."

John v. Gibson (Prior decision 270 F.2d 36, 4 Race Rel. L. Rep. 917, *infra* [9th Cir. 1959]). No. 470 Misc., February 23, 1960, 28 L. W. 3246.

Kasper v. Tennessee (Prior decision 326 S.W.2d 664, 4 Race Rel. L. Rep. 620 [Tenn. Supreme Court, 1959] affirming conviction for inciting to riot at the time the Nashville school desegregation plan was first put into effect and overruling contentions that trial court erred in not sustaining motions to quash the array of jurors and for change of venue on the alleged grounds that the panel did not comprise a geographic or economic cross-section of the county and were strongly biased against the defendant; that the evidence preponderated against the verdict and in favor of the defendant's innocence; and that the evidence failed to show that as many as three people were assembled at any time or that a riot ever occurred). No. 561, January 11, 1960, 80 S.Ct. 374. Other decisions: 1 Race Rel. L. Rep. 872, 1045 (1956); 2 Race Rel. L. Rep. 26, 317, 792, 795 (1957); 4 Race Rel. L. Rep. 252, 285, 538 (1959).

Kelley v. Board of Education of City of Nashville, Davidson County, Tennessee (Prior decision 270 F.2d 209, 4 Race Rel. L. Rep. 584 [6th Cir. 1959]; docketed 28 L.W. 3131, 4 Race Rel. L. Rep. 541). No. 477, December 14, 1959, 80 S.Ct. 293, order: "The petition for writ of certiorari is denied. The CHIEF JUSTICE, Mr. Justice DOUGLAS, and Mr. Justice BRENNAN, although cognizant that the District Court retained jurisdiction of the action during the transition, would grant the petition for certiorari limited to the fourth question: whether the provisions of paragraphs four and five of the plan are constitutionally invalid for the reason that they explicitly recognized race as an absolute ground for the transfer of students between schools, thereby perpetuating rather than limiting racial discrimination."

Larsen v. Gibson (Prior decision 267 F.2d 386, 4 Race Rel. L. Rep. 918, *infra* [9th Cir. 1959]). No. 136 Misc., October 12, 1959, 80 S.Ct. 106.

Marshall v. Brotherhood of Locomotive Firemen and Enginemen (Prior decision 268 F.2d 445, 4 Race Rel. L. Rep. 646 [5th Cir. 1959] affirming a holding that allegations that a railroad company had added "swing men" to take runs from individual firemen solely to the benefit of white, and to the detriment of Negro, firemen had not been proved so as to make the company in contempt of an injunction against discrimination). No. 542, January 18, 1960, 80 S.Ct. 407. Another decision: 3 Race Rel. L. Rep. 680 (1958).

Spampinato v. M. Breger & Co. (Prior decision 270 F.2d 46, 4 Race Rel. L. Rep. 923, *infra* [2d Cir. 1959]). No. 325 Misc., January 18, 1960, 80 S.Ct. 409. Rehearing denied, February 23, 1960, 28 L.W. 3246.

Steier v. New York State Education Commissioner (Prior decision 271 F.2d 13, 4 Race Rel. L. Rep. 887, *infra* [2d Cir. 1959]). No. 586, February 23, 1960, 28 L.W. 3246, order: "The motion for leave to proceed on a typewritten petition is granted. The petition for writ of certiorari is denied."

Walker v. Bank of America National Trust & Savings Association (Prior decision 268 F.2d 16, 4 Race Rel. L. Rep. 920, *infra*, [9th Cir. 1959]). No. 453, November 23, 1959, 80 S.Ct. 211, order: "Motion to dispense with printing petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied." January 11, 1960, 80 S.Ct. 367, order: "Petition for rehearing denied."

Other orders:

Hannah v. Larche; Hannah v. Slawson (Prior decisions 176 F.Supp. 791, 177 F.Supp. 816, 4 Race Rel. L. Rep. 935, *infra* [W.D. La. 1959]). Nos. 549, 550, December 7, 1959, 80 S.Ct. 263, order: "Upon consideration of the motion to advance filed by the Solicitor General wherein he states that his brief on the merits will be filed on or before December 15, 1959, the Court directs that on or before Wednesday, January 13, 1960, the appellees shall file any motion or motions responsive to the statement as to jurisdiction and on the merits of the case, the respondents shall file any brief relating to the granting or denying of the petition for writ of certiorari and on the merits of the case, and the cases are set for oral argument on Monday, January 18, 1960, on the petition for writ of certiorari, the jurisdiction on appeal, and on the merits of the cases. The cases are consolidated for the purpose of this argument and a total of four hours is allowed."

Paul v. Washington (Prior decision 337 P.2d 33, 4 Race Rel. L. Rep. 992, *infra* [Wash. Supreme Court, 1959]). No. _____, November 23, 1959, 80 S.Ct. 203, order: "The motion to dismiss under Rule 14, subd. 2, 28 U.S.C.A., is granted."

Power Authority of the State of New York v. Tuscarora Indian Nation

Prior decision 79 S.Ct. 1437, 4 Race Rel. L. Rep. 252 [1959] in which the Supreme Court of the United States granted certiorari). No. 66, November 16, 1959, 80 S.Ct. 194, order: "The motion to advance is granted and this case, together with the companion case, Federal Power Commission v. Tuscarora Indian Nation, 360 U.S. 915, 79 S.Ct. 1435, 3 L.Ed.2d 1532 is set for argument on Monday, December 7, 1959."

United States v. Thomas (Prior decision ——— F.2d ——— [5th Cir. 1960] granting stay of district court injunction order pending appeal therefrom in a suit under the 1957 Civil Rights Act by the United States against a Louisiana parish registrar, the Citizens' Council of the parish, and named members of the Council, in which it was alleged that defendants had been guilty of racial discrimination in effecting the removal of 1377 Negroes' names from the parish voting rolls for technical deficiencies in complying with state registration statutes, the order requiring the reinstatement within ten days of every voter thus purged). No. 667, January 26, 1960, 28 L.W. 3231, order:

"On application to vacate order of the Court of Appeals granting stay of injunction pending appeal and to reinstate injunction issued by the District Court. Per Curiam: The application of the United States for an order vacating the stay order of the Court of Appeals entered January 21, 1960, and reinstating the decree of the District Court, together with request of the Attorney General of Louisiana for argument thereon, have been considered by the Court.

1. It appears, as respondents pointed out in their application to the Court of Appeals for the stay herein, that the issues in *United States v. Raines*, No. 64, now pending on appeal in this Court, are pertinent to the disposition of this case. In view of this, and of the fact that the issues raised by this application are closely related to those involved on the merits of the controversy now before the Court of Appeals, the Court believes that the entire matter should be considered at one time. In light of the foregoing, and of the imminence of the State general election scheduled for April 19, 1960, the Court will entertain a petition for certiorari to review the judgment of the District Court, 28 U.S.C. §§ 1254(1), 2101(e), if filed by the Solicitor General on or before January 29, 1960. The petition may be filed in typewritten form. See the action of the Court as to *Bolling v. Sharpe*, et al., 344 U.S., at 3.

2. In the event that such petition is so filed, the Court will hear argument upon the present application, the petition, and the merits, on February 23, 1960, the case to be set at the head of the calendar for that day. See *Hannah v. Larche*, No. 549; *Hannah v. Slawson*, No. 550, 361 U.S._____, December 7, 1959.

3. The record, which may be filed in typewritten form, and the Government's brief on all matters will be filed on or before February 10, 1960, and the answering briefs of the respondents will be filed on or before February 20, 1960. The Government may file a reply brief on or before February 22, 1960."

Petition for certiorari to the Court of Appeals for the Fifth Circuit in advance of judgment, docketed January 29, 1960, 28 L.W. 3235. Another decision: 4 Race Rel. L. Rep. 962, *infra* (1959).

Cases docketed:

Gallagher v. Crown Kosher Supermarket of Massachusetts, Inc. (Prior decision 176 F.Supp. 466, 4 Race Rel. L. Rep. 1016, *infra* [D. Mass. 1959]). No. 532, November 17, 1959, 28 L.W. 3167.

Gomillion v. Lightfoot (Prior decision 270 F.2d 594, 4 Race Rel. L. Rep. 993, *infra* [5th Cir. 1959]). No. 668, January 30, 1960, 28 L.W. 3235.

Harris v. Illinois (Prior decision 17 Ill.2d 446, 161 N.E.2d 809, 4 Race Rel. L. Rep. 1048, *infra* [Ill. Supreme Court, 1959]). No. 707, February 13, 1960, 28 L.W. 3247.

Hayes v. Seaton (Prior decision 270 F.2d 319 [D.C. Cir. 1959] holding that, under a statute providing that the Secretary of the Interior's decision ascertaining heirs of intestate Indian to whom lands had been allotted is final and conclusive, that official's decision that an Indian who, within a year before his father died leaving a will giving residue of property to him, disappeared without being heard from thereafter, had survived his father so that the property of both father and son went to son's heir was final and conclusive). No. 665, January 28, 1960, 28 L.W. 3235.

Monroe v. Pape (Prior decision 272 F.2d 365 [7th Cir. 1959] affirming dismissal of an action under the federal Civil Rights Act for alleged misconduct by city police officers consisting of unreasonable search and seizure, unjustified batteries, and detentions, in violation of Fourteenth Amendment rights as insufficient to state a claim within the Act under previous decisions of the Seventh Circuit Court of Appeals). No. 712, February 17, 1960, 28 L.W. 3247.

The first of these is the fact that the soil is not only a source of food for the plants, but also a source of food for the animals which live in it. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The second of these is the fact that the soil is a source of water for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The third of these is the fact that the soil is a source of air for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The fourth of these is the fact that the soil is a source of light for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The fifth of these is the fact that the soil is a source of heat for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The sixth of these is the fact that the soil is a source of sound for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The seventh of these is the fact that the soil is a source of taste for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The eighth of these is the fact that the soil is a source of smell for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The ninth of these is the fact that the soil is a source of touch for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The tenth of these is the fact that the soil is a source of sight for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The eleventh of these is the fact that the soil is a source of hearing for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

The twelfth of these is the fact that the soil is a source of feeling for the plants. The soil is a complex system of living organisms, and the plants and animals which live in it are dependent on each other for their survival.

COURTS

EDUCATION Public Schools—Arkansas

E. A. HENRY, William Laubach, et al. v. W. G. TARPLEY, Marion Ward and H. H. Harris, individually, as taxpayers and as representatives of a class.

Supreme Court of Arkansas, June 1, 1959, 324 S.W.2d 503.

SUMMARY: Act 107 of the 1959 Arkansas General Assembly [4 Race Rel. L. Rep. 1053, *infra* (1959)] provides procedures by which a special election may be held in a county of 100,000 population or more to determine whether the county shall be constituted a County Equalizing School District, not altering or affecting, however, the powers or duties of the county's school districts. The Act further provides that, after the establishment of an equalizing district, the electors thereof may at the annual school election vote for allocation to the district of a specified part of the total tax proposed by the school board of each district. The monies thus allocated to the Equalizing District are to be used for "equalizing educational opportunities" in the county's public schools, the county board of education being required to distribute the monies to each district in proportion that its average daily attendance bears to that of all county pupils for the previous year. It is specified, however, that the average daily attendance of a school closed by Governor's proclamation under Act 4, Second Extra-Ordinary Session, 1958 [3 Race Rel. L. Rep. 1048 (1958)] shall be that of the year immediately preceding its closing and shall continue to be such until one full school year after its reopening. A taxpayers' action challenging Act 107, brought in an Arkansas chancery court, was decided in favor of the taxpayers. On appeal, the Arkansas Supreme Court affirmed, holding the Act invalid for (1) purporting to authorize special elections to determine school districts' fiscal affairs, whereas the state constitution permits and recognizes only annual school elections for such purposes, and (2) attempting to place a limitation on the number of mills that electors in a school district may vote on themselves, whereas the state constitution places no such limitations on the voters.

HOLT, Justice.

This appeal involves the constitutionality of Act 107 of the 1959 Legislature. On a hearing, the trial court held the Act unconstitutional on two grounds: (1) that it violates Amendment No. 40 to the Constitution of the State of Arkansas and, (2) that it also violates Amendment No. 14 for the reason that it was special and local in its effect.

Since we have concluded that the Act clearly, we think, violates Amendment 40 on two grounds, which we shall point out, it becomes unnecessary to consider whether it violates Amendment 14.

[Act 107 Summarized]

A brief summary of Act 107 may be stated as follows:

(1) Upon the petition of not less than 10% of the qualified electors of each of the school districts within any county that may now or hereafter have a population of 100,000 or more, the County Board of Election Commissioners of the county shall call a special election on the question of whether the county shall be a County Equalizing School District.

(2) If a majority of the "qualified electors in the county voting on the issue" shall vote for the County Equalizing School District, the same

shall be established and if a majority vote against the County Equalizing School District, the same shall not be established, and another election shall not be held in the same county for a period of two years.

(3) If the vote is for County Equalizing School District, the County Board of Election Commissioners certify the same to the County Clerk and the district is named for the county voting for the same.

(4) The County Equalizing School District shall be composed of the territory of the school districts of the county voting the same but "The establishment of a County Equalizing School District shall, in no way, alter, change, or affect any of the powers, duties or existence of any of the school districts of the county".

(5) The electors of the County Equalizing School District (thus the electors of the entire county) have the power at the annual school election to vote for the allocation of a portion of the total tax proposed by the school board of each school district and such revenue as may accrue from the annual tax allocated to the County Equalizing School District shall be distributed to the respective school districts of the county to be used for equalizing educational purposes.

The County Board of Education serves as the board of the County Equalizing School District and the County Board of Education "shall provide for the placing on the ballot" in each school district the question of the voting for the allocation of nine mills at the first annual election after the establishment of such Equalizing District, and thereafter 18 mills. "If a majority of the qualified electors in the County Equalizing School District voting on the issue" votes for the allocation, the appropriate county officials levy, collect and distribute the revenues from the tax to the Equalizing District to be used for the purposes of the Act. If a majority votes against the allocation, the millage shall be levied, collected and credited to the respective school districts by the appropriate county officials. The Act states its purpose to be that the school boards of the respective school districts shall propose the total millage levy for vote in each school district of the county.

(6) The County Board of Education distributes moneys derived by the Equalizing District as follows:

A. To each district a proportional part of the total funds as the average daily attendance of pupils in said district for the previous year bears to all pupils in average daily attendance for the previous year in all school districts of the county. Average daily attendance, in the case of a school closed by Governor's Proclamation of Act 4 of the Second Extraordinary Session of 1958, is defined to be that of the year immediately preceding such closing and shall so continue until one full year after the school has been reopened.

B. The funds are to be distributed and credited by the County Treasurer upon order of the County Board of Education, to the school districts as now provided by law for distribution of funds derived from school millage levies. Funds so received may be used for maintenance and operation, erection and equipment of buildings and retirement of existing indebtedness.

(7) Section 7 of the Act repeats the intent that nothing shall amend, alter, diminish or change any of the existing powers and duties of school districts of the state.

(8) The Act contains a separability clause, a repealing clause, and an emergency clause.

Amendment 40 provides: "Poll tax—School district tax—Budget—Approval of tax rate by electors.—The General Assembly shall provide for the support of common schools by general law, including an annual per capita tax of one dollar, to be assessed on every male inhabitant of this State over the age of twenty-one years; and school districts are hereby authorized to levy by a vote of the qualified electors respectively thereof an annual tax for the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness, the amount of such tax to be determined in the following manner: The Board of Directors of each school district shall prepare, approve and make public not less than sixty (60) days in advance of the annual school election a proposed budget of expenditures deemed necessary to provide for the foregoing purposes together with a rate of tax levy sufficient to provide the funds therefor, including the rate under any continuing levy for the retirement of indebtedness. If a majority of the qualified voters in said school district voting in the annual school election shall approve the rate of tax so proposed by the

Board of Directors, then the tax at the rate so approved shall be collected as provided by law. In the event a majority of said qualified electors voting in said annual school election shall disapprove the proposed rate of tax, then the tax shall be collected at the rate approved in the last preceding annual school election. Provided, that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied."

[Special Elections Invalid]

Sections 1 and 2 of Act 107 make provisions for calling special elections for determining fiscal affairs of a school district which we have heretofore held to be in violation of the provisions of Amendment 40 which does not permit, or recognize, special elections, but only annual school elections for such purpose. In *Adams v. DeWitt Special School District No. 1*, 214 Ark. 771, 218 S.W.2d 359, 360, in considering Amendment 40, we held that "Special Elections are not recognized by the Amendment," (headnote 3) and in the opinion we said: "The Amendment (40) is comprehensive in that it removes all prior financial restrictions upon the electorate. Buildings, equipment, existing indebtedness, maintenance, all may be cared for in the Board's recommendations, and finality needs only the approval of a majority of those voting. The entire plan revolves around the annual election, mentioned four times."

In *Sims v. Hazen School District No. 2*, 215 Ark. 536, 221 S.W.2d 401, where there was involved the question, whether a school district could impose a tax to support a bond issue at a special election held for that purpose, we there said:

"We hold that it cannot for the reason that Amendment No. 40 of our Constitution, adopted November 2, 1948, prohibits the imposition of such a tax unless it has been approved by a majority vote of the qualified electors of such School District at an annual school election, and not at a special election, as was attempted here.

"The General Assembly could not by any provision of Act 161, *supra*, do anything forbidden by the Constitution. We said in *Hart v. Wimberly*, 173 Ark. 1083, 296 S.W. 39, 42, 'The Act * * * could not have the effect of amending the Constitution, as

would be the result if the contention of counsel be correct. The Legislature cannot cure a proceeding made void by the Constitution, and no act that it passes can breathe vitality into a thing that is dead. The Legislature cannot do indirectly a thing directly prohibited by the Constitution."

We hold, therefore, that the Act is void for this reason.

[Tax Limitation Invalid]

We hold also that the Act is clearly void and unconstitutional for still another reason: It will be observed that Section 5 of the Act attempts to place a limit on the number of mills that the electors in a school district may vote upon themselves for school purposes by providing that, "The number of mills to be allocated to the County Equalizing School District at the first annual school election after the establishment of such District shall be nine (9) mills, and thereafter the number of mills to be allocated to the County Equalizing School District shall be eighteen (18) mills."

This attempted limitation is right in the teeth of Amendment 40 which places no limitation whatever on the number of mills that any school district may vote at any annual school election. Amendment 40 specifically places the amount needed to operate a school district in the hands of the voters of such district and removes all financial restrictions as to their powers in determining these amounts deemed necessary by the Board of Directors of the District for maintenance of schools, the erection and equipment of school buildings and the retirement of school indebtedness, while Act 107 provides that the millage cannot be less than 9 mills in the first school election and 18 mills thereafter, whether those amounts are needed or not.

Accordingly, the decree is affirmed.

GEORGE ROSE SMITH, Justice (concurring).

The only constitutional point I find it necessary to consider is the clear violation of the proviso in Amendment 40, which directs that no school tax "be appropriated for any other purpose nor to any other district than that for which it is levied."

The equalizing school district created by Act

107 is not really a school district at all; calling it a school district does not make it one. It has no schools, no teachers, no pupils. It is simply a bookkeeping device by which tax money is to be taken from one or more of the true school districts in the county and given to one or more of the other districts. It seems so plain to me that the constitution cannot be circumvented in this manner that I see no need to express an opinion upon the various other issues that have been presented.

McFADDIN and ROBINSON, JJ., join in this opinion.

* * *

JOHNSON, Justice (dissenting).

In respectfully dissenting to the majority view, I am convinced that Act 107 of 1959 does not violate Amendment No. 40 to the Constitution of the State of Arkansas.

In the past year it has been necessary for high schools in Pulaski County outside of the Little Rock School District to enroll students whose residences are within the Little Rock District due to that district's high schools being closed. This influx of additional students has caused these schools to suffer unreasonable financial hardships. Act 107 provides an ingenious method whereby the financial difficulties of these schools may be relieved.

Act 107 cannot be viewed as a temporary measure simply because the high schools in Little Rock may be opened in the future. There will always be those in the Little Rock District who love their children enough to insist that they attend segregated schools.

It cannot be argued that the legislature does not have the constitutional authority to provide for the creation of school districts. There is no constitutional provision setting out the kind or number of school districts the legislature may cause to be created. In passing Act 107 of 1959 the legislature chose to create a "County Equalizing School District" to be composed of the existing school districts in the county. In the absence of a constitutional prohibition against the creation of such a district, how can it be said that they did not have the authority to do so.

The majority contends that the creation and operation of such a district violates Amendment No. 40. Let us examine this constitutional provision. Amendment No. 40 simply authorizes school districts to levy an annual tax (a) for the

maintenance of schools, (b) for the erection and equipment of buildings, and (c) for the retirement of existing indebtedness, specifies that no tax levied, assessed and collected for the benefit of a school district shall be appropriated for any other purpose or to any other district than that for which it is levied. A careful review of the record reveals that Act 107 of 1959 does not appropriate any tax levied and collected for the benefit of one school district to another. It clearly provides that the electors of the County Equalizing School District must vote upon the millage allocation. The end result is the levying and collecting of taxes within the County Equalizing School District for use within the County Equalizing School District. Such procedure is expressly authorized by Amendment 40 wherein it is stated: "School districts are hereby authorized to levy by vote of the qualified electors respectively thereof an annual tax * * *." The conclusion is inescapable that Act 107 of 1959 is valid. It follows and implements the express purposes of Amendment 40 and should therefore be upheld.

Further, the Act does not offend Amendment 40 by authorizing a special election to determine whether a County Equalizing School District should be established. The only special election which is violative of that Amendment is one called to impose a tax to support a bond issue. *Sims v. Hazen School District 2*, 215 Ark. 536, 221 S.W.2d 401.

In *Bush v. Martineau*, 174 Ark. 214, 295 S.W. 9, 10, this Court said:

"Before proceeding to a discussion of the issues raised by this appeal, we deem it proper to premise our remarks by two fundamental rules of construction announced and adhered to throughout the history of this court. First, that the Constitution of this state is not a grant of enumerated powers to the Legislature, not an enabling, but a restraining act (*Straub v. Gordon*, 27 Ark. 625, 629), and that the Legislature may rightfully exercise its powers, subject only to the limitations and restrictions of the Constitution of the United States and of the State of Arkansas. (*St. Louis, I. M. & S. R. Co. v. State*, 99 Ark. 1, 136 S.W. 938; *Vance v. Austell*, 45 Ark. 400; *Carson v. St. Francis Levee Dist.*, 59 Ark. 513, 27 S.W. 590; *Butler v. Board, etc.*, 99 Ark. 100, 137 S.W. 251). In other words, as was said in Mc-

Clure v. Topf & Wright, 112 Ark. 342, 166 S.W. 174: 'It is not to be doubted that the Legislature has the power to make the written laws of the State, unless it is expressly, or by necessary implication, prohibited from so doing by the Constitution, and the act assailed must be plainly at variance with the Constitution before the court will so declare it.' Second, that an act of the Legislature is

presumed to be constitutional, and will not be held by the courts to be unconstitutional, unless there is a clear incompatibility between the act and the Constitution, and, further, that all doubt on the question must be resolved in favor of the act."

Seeing no reason to deviate from the settled rules of this Court, I would accordingly reverse the judgment.

EDUCATION

Public Schools—Florida

Theodore GIBSON, as next friend for Theodore Gibson, Jr., et al. v. BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY, FLORIDA et al.

United States Court of Appeals, Fifth Circuit, November 24, 1959, 272 F.2d 763.

SUMMARY: Negro school children in Dade County, Florida, in June, 1956, brought a class action in federal district court against county officials for a declaration that state constitutional and statutory provisions requiring racial segregation in public schools violate the Fourteenth Amendment, for an order requiring prompt presentation of a school desegregation plan, and for an injunction against regulating school attendance on a racial basis under a 1955 county school board resolution. Eventually [for intervening developments see summary at 4 Race Rel. L. Rep. 21 (1959)] the court declared the state segregation requirements unconstitutional, but held that the Florida Pupil Assignment Law of July, 1956 [1 Race Rel. L. Rep. 924 (1956)] met plaintiffs' demand for a desegregation plan. Injunctive relief was denied because the resolution complained of had been superseded by one of August, 1956, implementing the Assignment Law, and plaintiffs had not availed themselves of administrative remedies provided by that law. 170 F.Supp. 454, 4 Race Rel. L. Rep. 21 (S.D. Fla. 1958). The Court of Appeals for the Fifth Circuit reversed and remanded. It noted that under the implementation resolution children had been assigned en masse to schools in which they had been previously enrolled or, in the case of unregistered children, to those in which they would have been registered had they been present; that the admission application form being used contains no clear indication that the applicant should specify a choice of schools; and that defendants did not advise children and their parents or school principals and teachers that the choice of any Negro student to attend other than an all-Negro school was entitled to fair consideration by the board. The court also pointed out that various records used by defendants showed that complete racial segregation of teachers and pupils prevailed in county schools at the time of the trial in the fall of 1958 under "for all practical purposes" a "requirement" therefor. It was concluded therefore that the Assignment Law and the resolution failed to suffice as a desegregation plan, there being nothing in them inconsistent with a continuing policy of compulsory segregation. Finally, the Court of Appeals suggested that the board might submit a plan to the district court whereby plaintiffs and their class would be given a reasonable and conscious opportunity to apply for admission to any schools for which

they are eligible without regard to race and to have that choice fairly considered by the enrolling authorities; and the district court was instructed to retain jurisdiction during the transitional period.

Before RIVES, Chief Judge, and BROWN and WISDOM, Circuit Judges.

RIVES, Chief Judge.

This action, filed June 12, 1956, sought a judgment declaring Article 12, Section 12 of the Constitution of the State of Florida and Section 228.09 Florida Statutes Annotated to be violative of the Fourteenth Amendment to the Constitution of the United States. That much has been conceded by the defendants from the beginning. The complaint further prayed that the Board of Public Instruction be ordered to desegregate the public schools of Dade County and be enjoined from requiring the plaintiffs and other Negroes of school age to attend or not to attend particular public schools because of their race. The district court dismissed the complaint because the plaintiffs had not made application for admission to a particular school. This Court reversed and, in effect, held that a primary and positive duty rested upon the Board of Public Instruction to comply with the May 17, 1954, ruling of the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483.¹ That holding was clearly required by the implementing decision, *Brown v. Board of Education*, 1955, 349 U.S. 294, 300, 301, now reaffirmed in *Cooper v. Aaron*, 1958, 358 U.S. 1, 7.

[Further Relief Denied]

Upon remand, after a full hearing, the district court rendered final judgment declaring the Article of the State Constitution and the Section of the State Statutes under attack to be violative of the Fourteenth Amendment, as admittedly they are, but denying any further relief to the plaintiffs.² The present appeal is from that judgment.

To some extent the facts have been set forth in the former opinion of this Court (footnote 1, supra) and in the opinion of the district court (footnote 2, supra) upon remand. The bases for the rulings of the district court sufficiently appear in the following two extracts from its opinion:

1. *Gibson v. Board of Public Instruction of Dade County*, 5th Cir. 1957, 246 F.2d 913.
2. The opinion of the district court is reported as *Gibson v. Board of Public Instruction of Dade County, Florida*, 170 F.Supp. 454.

"As to the prayer of the complaint that the Court order the defendants to promptly present a plan of desegregation of the schools, the Court finds that the Florida Pupil Assignment Law enacted by the Legislature of Florida since the filing of this suit meets the requirements of such a plan and the demands of the plaintiffs. . . .

"The plaintiffs now have available to them adequate remedies under the Pupil Assignment Law for any of their grievances pleaded in the complaint. The record shows that they have not pursued them and until they do so and have been denied their rights they are not entitled to injunctive relief."

Gibson v. Board of Public Instruction of Dade Co., Fla., footnote 2, supra, 170 F.Supp. 454, 457, 459.

The Florida Pupil Assignment Law³ was enacted on July 26, 1956, more than a month after the complaint in this case had been filed. Prior to the enactment of that law, it is conceded that the Public Schools in Dade County were racially segregated. Within a month after the enactment of the Pupil Assignment Law, the Board of Public Instruction of Dade County adopted an "Implementation Resolution." For the next school year 1956-57, then about to commence, that resolution assigned en masse the children to the same schools in which they were then enrolled, and assigned unregistered pupils "to the school in which he or she would have been registered had he or she been present." As to school terms after 1956-57, however, the resolution provided:

"Section 3. Prior to the close of the 1956-57 school year or such other date as the Board may specify and each year thereafter this Board, pursuant to the provisions of the Pupil Assignment Law, will assign to a school for the following year each child theretofore attending a school by assignment from this Board. The record of all assignments shall be open for inspection

3. Florida Statutes Annotated, Section 230.232.

in the office of the superintendent, and, in addition thereto, notice of assignment shall be given to each pupil and his parents.

"Section 4. This Board will assign to a school for the 1956-57 school term and each year thereafter each qualified child, not heretofore attending a school by assignment from this Board, whose parent applied for admission of such child. Such assignment will be made pursuant to all of the provisions of the Pupil Assignment Law. Application for admission shall be made on forms to be approved by the board and made available at the office of the superintendent and the principal of each school. When completed, such applications shall be submitted by the superintendent for action by the board. Records of assignments hereunder shall be open for inspection in the office of the superintendent, and notice of assignment shall promptly be given the pupil and his parents should the application for admission to a specific school be denied."

A card form of application for admission was approved by the Board. That form contained no clear indication that the applicant should indicate any choice of schools, but contained in its upper left-hand corner the single word "School: . . ." followed by a blank space. No notice or advice from the Board or Superintendent was given to the children and their parents, or to the school principals and teachers who received their applications for admission, to the effect that Negro children, or their parents for them, were now permitted to have considered fairly by the Board any choice to attend a school other than an all-Negro school. With very few possible exceptions, they all remained unaware that the pre-existing policy of the Board might have been changed. Under such circumstances, it is obvious that the pupil assignment cards manifested no conscious preference for continued segregation on a voluntary basis.

[Segregation Prevailed]

At the time of trial, in the Fall of 1958, complete actual segregation of the races, both as to teachers and as to pupils, still prevailed in the public schools of the County. A census record card kept by the Board on each pupil still showed the designation of his race by the initials "W.N.Y." The Superintendent explained: "Well, that form just hasn't been corrected. We have

a multiplicity of forms, and all of them have been corrected except that one, that I know of." However, another Board form, captioned "PUBLIC SCHOOLS, DADE COUNTY, FLORIDA, 1958-59 SUBSTITUTE TEACHERS GUIDE," listed under the word "WHITE," 12 Senior High Schools, 32 Junior High Schools, and 107 Elementary Schools, and under the word "NEGRO," 4 Senior High Schools, 5 Junior High Schools, and 19 Elementary Schools. The Superintendent explained that that list did not refer to pupils, but meant simply that, "The personnel, the instructional personnel are all one or the other." The distinction is not very meaningful so long as the schools having all Negro teachers also have all Negro pupils, and no other schools have any Negro teachers or pupils. From a careful study and consideration of the entire record, the conclusion is inescapable that the plaintiffs and the members of the represented class have not been afforded a reasonable and conscious opportunity to have their choice of school considered by the enrolling authorities. For all practical purposes, the requirement of racial segregation in the public schools continued at the time of trial.

That being true, we cannot agree with the district court that the Pupil Assignment Law, or even that the Pupil Assignment Law plus the Implementing Resolution, in and of themselves, met the requirements of a plan of desegregation of the schools or constituted a "reasonable start toward full compliance" with the Supreme Court's May 17, 1954, ruling. That law and resolution do no more than furnish the legal machinery under which compliance may be started and effectuated. Indeed, there is nothing in either the Pupil Assignment Law or the Implementing Resolution clearly inconsistent with a continuing policy of compulsory racial segregation.⁴

[Alabama Case Cited]

The district court cited in support of its decision *Shuttlesworth v. Birmingham Board of Education*, N.D. Ala. 1958, 162 F.Supp. 372. The judgment in that case was affirmed by the Supreme Court "upon the limited grounds on which the District Court rested its decision." *Shuttlesworth v. Birmingham Board of Education*, 1958, 358 U.S. 101. The district court had limited its decision in that case so as not to pass

4. See *Kelley v. Board of Education*, M.D. Tenn. 1958, 159 F.Supp. 272, 277.

separately upon any particular tests, parts or sections of the Alabama School Placement Act. (See 162 F.Supp. at pp. 382, 383.) The decision was further limited to the constitutionality of the law *upon its face*. (See 162 F.Supp. at p. 384.) The district court in the present case would extend the effect of the holding in the Shuttlesworth case, saying:

"The three-judge court in the Birmingham case also denied all injunctive relief to the plaintiffs and left them to the fair operation of the School Placement Law and the remedies therein provided. The Court in that case was likewise considering the issue raised by the complaint as a basis for the application for an injunction that despite the passage of the Pupil Placement Law, Negro students were still being assigned to the same schools on a basis of segregation of the races irrespective of the nearness of other public schools to the homes of the plaintiffs."

Gibson v. Board of Public Instruction of Dade Co., Fla., supra, 170 F.Supp. 454, 458, 459. The plaintiffs in the Shuttlesworth case, supra, did in fact exhaust their administrative remedies under the Alabama School Placement Law. (See 162 F.Supp. at pp. 372, 373.) The Shuttlesworth case in the district court was confined to an attack upon the constitutionality of the Placement Law on its face, and no evidence was offered to sustain the parts of the complaint charging discrimination by any means other than by the Placement Law upon its face. (See 162 F.Supp. at pp. 375, 376 and footnote 3.) In our opinion, the Shuttlesworth case affords no support for the decision of the district court in the present case.

On the first appeal in this case, we said that so long as the requirement of racial segregation continues throughout the public school system it is premature to consider the effect of the law

providing for the assignment of pupils to particular schools. (See 248 F.2d at 914, 915.) Obviously, unless some legally non-segregated schools are provided, there can be no constitutional assignment of a pupil to a particular school. We do not understand that the Fourth Circuit has ruled to the contrary.⁵ The net effect of its rulings, as we understand them, is that the desegregation of the public schools may occur simultaneously with and be accomplished by the good faith application of the law providing for the assignment of pupils to particular schools. If that understanding is correct, then we readily agree.

In that connection, the Board may, if it chooses, submit for the consideration of the district court a plan whereby the plaintiffs and the members of the class represented by them are hereafter afforded a reasonable and conscious opportunity to apply for admission to any schools for which they are eligible without regard to their race or color, and to have that choice fairly considered by the enrolling authorities. In the event of the submission and approval of such a plan, the district court might properly wait a reasonable time for the necessary administrative action before finding whether further proceedings are necessary. In any event, the district court should proceed in accordance with this opinion and with the two opinions of the Supreme Court in *Brown v. Board of Education*, supra, and should retain jurisdiction during the period of transition.⁶ The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

5. See *Carson v. Warlick*, 4th Cir. 1956, 238 F.2d 724; *Covington v. Edwards*, 4th Cir. 1959, 264 F.2d 780; *Holt v. Raleigh City Board of Education*, 4th Cir. 1959, 265 F.2d 95; *Allen v. County School Board of Prince Edward County, Va.*, 4th Cir. 1959, 266 F.2d 507.
6. *Brown v. Board of Education*, 1955, 349 U.S. 294, at 301; see also, *Rippy v. Borders*, 5th Cir. 1957, 250 F.2d 690, 694.

EDUCATION Public Schools—Florida

Andrew L. MANNINGS, a Minor, etc., et al. v. THE BOARD OF PUBLIC INSTRUCTION OF HILLSBOROUGH COUNTY, FLORIDA, et al.

United States District Court, Southern District, Florida, Tampa Division, August 7, 1959, No. 3554.

SUMMARY: Minor Negro school children and their parents, residents of Tampa, Florida, brought a class action in federal district court against Hillsborough County school officials for a permanent injunction restraining defendants and their successors from continuing to operate the county public schools on a racially segregated basis and from refusing to permit the minor plaintiffs and other Negro children to attend schools nearer their homes solely because of race and color. The complaint alleged that defendants had refused to change their segregation policy after receiving requests to do so in a formal petition and in letters from Negro parents of public school children, all to the irreparable injury, past and continuing, of minor plaintiffs and in violation of rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment and the federal Civil Rights Act. Defendants moved to dismiss, and the court ordered the complaint dismissed without prejudice since it appeared that plaintiffs had not exhausted their remedies under the Florida Pupil Assignment Act [1 Race Rel. L. Rep. 924 (1956), 4 Race Rel. L. Rep. 751, (1959)].

WHITEHURST, District Judge.

ORDER

Pursuant to the order made and entered on June 9, 1959, setting down all of the motions then pending for argument, including the objections of the defendants to the several requests for admissions by the plaintiffs, this cause came on to be heard upon said motions. Counsel for the plaintiffs first withdrew their requests for admissions and for subpoenas duces tecum.

The Court having heard the arguments of counsel representing plaintiffs and defendants and being advised in the premises, being of the opinion that the several motions to dismiss the complaint should be sustained, since it does appear from the complaint, and it does appear

from admissions made before the Court, that the plaintiffs have not exhausted their administrative remedies under the Florida Pupil Assignment Act, (F.S.A. Sec. 230.232) it is, therefore,

ORDERED, ADJUDGED and DECREED that the motions to dismiss the complaint heretofore filed in this cause be and the same are hereby granted, and the complaint is hereby dismissed, without prejudice.

Since the complaint is dismissed, it is unnecessary to consider and rule upon the motions to strike portions of the complaint and other pending motions, nor proceed with the hearing on the motion for summary judgment.

ORDERED, ADJUDGED and DECREED at Tampa, Florida, this the 7th day of August, 1959.

EDUCATION Public Schools—New York

In re Stanley SKIPWITH, Charles Rector, et al. v. Julian O. WASHINGTON and Board of Education of the City of New York.

Supreme Court of New York, Appellate Division, First Department, March 31, 1959, 187 N.Y.S. 2d 325.

SUMMARY: See 180 N.Y.S. 2d 852, 4 Race Rel. L. Rep. 264 (Dom. Rel. Ct. 1958). "Motion granted in so far as to permit the movant, Public Education Association (PEA) to file a brief amicus curiae on the appeals."

EDUCATION

Public Schools—North Carolina

Joycelyn McKISSICK, by her mother and next friend, Evelyn W. McKissick, and Elaine Richardson, by her mother and next friend, Rachel Richardson, on behalf of themselves and others similarly situated v. DURHAM CITY BOARD OF EDUCATION and Luther E. Barnhard, et al., Members of the North Carolina State Board of Education.

United States District Court, Middle District, North Carolina, Durham Division, September 4, 1959, 176 F.Supp. 3.

SUMMARY: A class action was brought against the city and state boards of education in federal district court by parents as next friends for two Negro girls, citizens of Durham, North Carolina, whose applications for reassignment to city schools on a non-segregated basis had been denied. The complaint requested the convening of a three-judge court, the issuance of a preliminary injunction restraining defendants from enforcing state constitutional and statutory provisions and administrative orders requiring or resulting in racial segregation, a declaration of the legal rights of plaintiffs and those of their class to attend city schools without racial discrimination, and a court order requiring defendants to present promptly a plan for expeditiously desegregating city schools. As defendants admitted that the enforcement of any constitutional or statutory provision requiring racial segregation in public schools would be invalid, the court held that there was no need of a three-judge court. And as the state board had no control over local school officials relative to enrolling and assigning pupils, the court dismissed the complaint against it and its individual members. The court held that injunctive relief could not be granted against the city board because plaintiffs had not exhausted administrative remedies provided in North Carolina's Assignment and Enrollment of Pupils Act [1 Race Rel. L. Rep. 240 (1955); 1 Race Rel. L. Rep. 939 (1956)] and because plaintiffs were attempting to assert their rights in a class suit for a general desegregation order, rather than as individuals seeking admission to a particular school. It was pointed out further that plaintiffs had failed to appear at a hearing granted by the local board at their request, after the denial of their reassignment applications. However, the court added that board resolutions strongly suggest that plaintiffs were denied reassignment solely because of race and that it "heartily disapproves" the methods used by the board in giving assignment notices and particularly in delaying the making of assignments. As it appeared that one plaintiff lives a mile nearer to a white school than to the all-Negro school to which she had been assigned, the court deferred entry of judgment for a period of ten days to give her an opportunity to request that the case remain on the docket so that she would have further opportunity to exhaust her administrative remedies.

STANLEY, District Judge.

This class action was commenced on May 12, 1958, by Joycelyn McKissick, a 15-year-old Negro citizen of Durham, North Carolina, through her mother and next friend, Evelyn W. McKissick, and Elaine Richardson, a 13-year-old Negro citizen of Durham, North Carolina through her mother and next friend, Rachel Richardson, against the Durham City Board of Education and the North Carolina State Board of Education, to have declared the rights of the minor plaintiffs and the class of persons they represent to attend the public schools of the City of Durham without discrimination on account of race or color, and for injunctive relief.

[Complaint Allegations]

Briefly stated, the complaint alleges that the plaintiffs are citizens and residents of the City of Durham, North Carolina, and that the minor plaintiffs are eligible to attend the public schools of that city; that the action is brought on behalf of the plaintiffs and all others similarly situated, pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure, 28 U.S.C.A.; that the public schools in the City of Durham are operated by the Durham City Board of Education under the general supervision and control of the North Carolina State Board of Education; that the Durham City Board of Education maintains and generally supervises certain schools for the edu-

cation of white children exclusively and other schools for the education of Negro children exclusively; that all of said schools are being maintained and operated pursuant to the State Constitution, State statutes, State administrative orders and legislative policy requiring racial segregation in the public schools, which operation is repugnant to the Fourteenth Amendment to the Constitution of the United States; that on several occasions plaintiffs filed with the defendant, Durham City Board of Education, petitions and objections to further operation of the City schools on a racially segregated basis; that the defendant, Durham City Board of Education, has adopted a policy of delaying the assignment of pupils until the latter part of August of each year, thereby making it difficult, if not impossible, for the plaintiffs and those similarly situated, to exercise their administrative remedies until after the opening of school; that on or about the 23rd day of August, 1957, the plaintiffs petitioned the Durham City Board of Education for reassignment to a school they were qualified to enter, which request was refused; that on or about the 1st day of September, 1957, the plaintiffs petitioned the Durham City Board of Education for rehearing on their request for reassignment, and that after the rehearing the request was again refused; and that on or about the 15th day of October, 1957, the plaintiffs appealed to Mr. Charles F. Carroll, Superintendent of Public Instruction for the State of North Carolina, to advise the Durham City Board of Education to cease and desist from operating the public schools of the City of Durham on a racial basis, which request was refused. The plaintiffs pray (1) that a three-judge court be convened, (2) that a preliminary injunction be entered restraining the defendants from enforcing certain provisions of the State Constitution, State Statutes, and administrative orders of defendants which require or permit or result in racial segregation of the plaintiffs and other members of the class of persons which they represent, (3) that the legal rights of plaintiffs and the class of persons they represent be declared, and (4) that the court order defendants to promptly present a plan of desegregation to the court which will expeditiously desegregate the schools operated by the Durham City Board of Education.

[Answers Filed]

The defendants filed answers setting up a number of specific defenses, including the fail-

ure of the plaintiffs to exhaust their administrative remedies under the North Carolina Pupil Assignment Act. N.C.G.S. § 115-176 et seq. The defendants further denied the necessity for convening a three-judge court for the reason that the segregation of pupils in public schools because of race and color has been declared to be unconstitutional by numerous court decisions, including the Supreme Court of the United States and the Supreme Court of North Carolina, and that the plaintiffs were merely asking for a restatement of legal principles that have been stated and restated on numerous occasions.

After granting the requested time for completion of discovery, the case came on for trial before the court without a jury on March 31, 1959. At the conclusion of the trial, the court, by agreement of counsel, gave the parties a specified time to file, after being furnished with a transcript of the evidence, proposed findings of fact, conclusions of law and briefs.

The requests for findings of fact, conclusions of law and briefs of the parties having been received, the court, after considering the pleadings and the evidence, including answers to interrogatories and stipulations filed, and briefs of the parties, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated.

FINDINGS OF FACT

1. The minor plaintiff, Joycelyn McKissick, is a member of the Negro race, 15 years of age, a citizen and resident of the City of Durham, and brings this action through her duly appointed next friend, Evelyn W. McKissick. The minor plaintiff, Elaine Richardson, is a member of the Negro race, 13 years of age, a citizen and resident of the City of Durham, and brings this action through her duly appointed next friend, Rachel Richardson. This action was duly and properly instituted in this court, summons was duly served, and the parties are properly before the court.

2. The defendant, Durham City Board of Education, exercises such powers and duties as are conferred upon it by Chapter 115 of the General Statutes of North Carolina, and operates in the City of Durham seventeen elementary schools, four junior high schools, namely, Carr Junior High School, E. K. Powe Junior High School, East Durham Junior High School, and Whitted Junior High School, and two senior high schools, namely, Durham High School and Hill-

side High School. During the 1957-1958 school year, Carr Junior High School, E. K. Powe Junior High School, and East Durham Junior High School were attended exclusively by white pupils, and Whitted Junior High School was attended exclusively by Negro pupils. During the same school year, Durham High School was attended exclusively by white pupils and the Hillside High School was attended exclusively by Negro pupils.

3. On October 12, 1956, a petition on behalf of approximately 740 citizens of the City of Durham was presented to the Durham City Board of Education requesting said board to prepare a plan for desegregating the City schools. By letter dated November 15, 1956, the board replied to Mr. C. O. Pearson, one of the attorneys presenting the petition, as follows:

"Your communication of October 12, 1956, signed by you and others, was submitted to the Board of Education of the City of Durham at its regular meeting held November 12, 1956. Please be informed that a Special Committee of the Board has been carefully considering and is continuing the study of the decision in the case of *Brown vs. Board of Education of Topeka, Kansas* [349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083], as it affects or may affect the public schools in the City of Durham. The Committee is experiencing difficulty in formulating a recommendation which will meet with sufficient public support to insure continued operation of our local public schools. Therefore, the Committee feels that it should have additional time for further study.

"We are, of course, operating the local city schools under the statutes governing the admission of pupils in the public schools of this State and in accordance with our earnest desire to provide the best possible educational opportunity for all the children of our City."

4. On July 22, 1957, Mrs. F. B. McKissick, mother of Joycelyn McKissick, and Rachel Richardson, mother of Elaine Richardson, wrote letters to the Durham City Board of Education requesting that their children, including the minor plaintiffs, not be reassigned to a "segregated school system" for the ensuing year. Objection was made to the practice of the school board in making assignments such a short time prior to the opening of the school. The record

does not disclose what action, if any, was taken on these letters.

5. For the school year 1956-1957, the plaintiff, Joycelyn McKissick, was assigned to and attended Whitted Junior High School, and the plaintiff, Elaine Richardson, was assigned to and attended Walltown Elementary School.

6. At a meeting held on August 12, 1957, the Durham City Board of Education adopted a resolution providing that each child then attending a school by assignment from the board be assigned to the same school for the 1957-1958 school year; provided, that those children having satisfactorily completed the course of instruction of any public school within the administrative unit were to be assigned to the next succeeding grade in the school which served the graduates of the school from which they had graduated. Notice of the assignment was given by publication of said resolution in the Durham Morning Herald, a daily newspaper published in the City of Durham, North Carolina, on August 14 and 21st, 1957.

7. Pupils in the Durham City School System were assigned to schools for the school year 1957-1958 on the basis of two sets of city maps, one zoned exclusively for white pupils and one zoned exclusively for Negro pupils.

8. Pursuant to the assignments made by the resolution of the Durham City Board of Education on August 12, 1957, Joycelyn McKissick, one of the plaintiffs in this action, was assigned to Hillside High School and was duly enrolled in and attended said school for the school year 1957-1958. Elaine Richardson, one of the plaintiffs in this action, was assigned to Whitted Junior High School and was duly enrolled and attended said school for the school year 1957-1958.

9. On August 25, 1957, Mr. and Mrs. F. B. McKissick, parents of Joycelyn McKissick, made application to the Durham City Board of Education for a change of pupil assignment for their daughter, Joycelyn McKissick. The application was on a form supplied by the Durham City Board of Education and gave the following answers to certain questions appearing on the application:

"10. School to which child has been assigned by the Board:

"Hillside High School.

"11. School and grade to which assignment is requested.

"to be reassigned to high school nearest residence.

- "13. State specific reasons why child should not attend school to which child has been assigned: (If more space necessary, attach additional sheet.)

"to attend school on a non-segregated basis.

- "14. State specific reasons why child should be assigned to school named by you in Paragraph 11 above: (If more space necessary, attach additional sheet.)

"1. Child will have to leave home in the morning in order to catch a bus, transfer to another bus and get to school by 8:30.

Too much time is consumed in transporting child across town to school, making a hardship on mother in that other younger children have to be cared for."

The application for pupil assignment was received by the principal of Hillside High School on August 28, 1957. Thereafter it was delivered to Mr. Lew W. Hannen, Acting Superintendent of the Durham City Schools.

10. On August 23, 1957, Mrs. Rachel Richardson, mother of Elaine Richardson, made application to the Durham City Board of Education for a change of pupil assignment for her daughter, Elaine Richardson. The application was made on a form supplied by the Durham City Board of Education and gave the following answers to certain questions appearing on the application:

- "10. School to which child has been assigned by the Board:

"Whitted.

- "11. School and grade to which assignment is requested:

"To a public school nearest this pupil on a non segregated basis.

- "13. State specific reasons why child should not attend school to which child has been assigned: (If more space necessary, attach additional sheet.)

"The Board of Education of the City of Durham prior to 1954 and since, has made its assignments of pupils including this applicant, on a racial basis.

This assignment is harmful to the child psychologically, and makes the child feel that the state is working against it and it will not have an opportunity to develop into full citizenship, in the community.

- "14. State specific reasons why child should be assigned to the school named by you in Paragraph 11 above: (If more space necessary, attach additional sheet.)

"The Supreme Court of the United States has stated in the Brown case that there can be no segregation in public education. However, since its decision this Board has operated and continues to operate in direct conflict with the law. And by its acts is breeding contempt for the law by those who profess to teach respect for the law the students entrusted in their care."

The application for pupil assignment was received by the principal of Whitted Junior High School on August 27, 1957. Thereafter, it was delivered to Mr. Lew W. Hannen, Acting Superintendent of the Durham City Schools.

11. The plaintiff, Joycelyn McKissick, resides at 1123 Roxboro Street in the City of Durham, which is a distance of less than 1½ miles from Durham High School and a distance of more than 2½ miles from Hillside High School.

12. In the application for change of pupil assignment submitted on behalf of Elaine Richardson, her residence is stated as 1202 Fourth Street, presumably in the City of Durham. No evidence appears in the record, nor was any evidence offered at the trial or otherwise, as to the distance from this plaintiff's residence to any of the schools in the Durham school system, or as to where she was residing at the time of the trial.

13. The Durham City Board of Education met in special session on Tuesday, September 3, 1957, at 7:30 o'clock p. m., and considered applications for the reassignment of pupils, including the application of the parents of Joycelyn McKissick and the application of the mother of Elaine Richardson. At this special session neither the parents of Joycelyn McKissick, nor the mother of Elaine Richardson, nor Joycelyn McKissick or Elaine Richardson, nor anyone for or on their behalf, appeared before the Board in connection with the applications for change of pupil assignment. After approving the reassignment of several pupils, and denying requests for reassign-

ment of several other pupils, the minutes of the Board of September 3, 1957, show the following:

"The Board discussed fully each of eight applications for change of assignment from Whitted Junior High School 'to a public school nearest to the pupil on a non-segregated basis.' It was pointed out that Carr Jr. High School is already overcrowded in grades seven and eight, and that some previous applications for admission to that school had been denied.

"One application from Joycelyn Dazelle McKissick, Hillside High School 'to high school nearest residence' was discussed. It was brought out that it would be unwise psychologically and otherwise to reassign one applicant from Hillside to attempt adjustment to more than 1200 pupils at Durham High School."

Each of the nine applications mentioned were disapproved by the adoption of the following resolution:

"Be It Resolved By The Board of Education of the City of Durham: That in order to best promote the orderly and efficient administration of the public schools in this administrative unit, the effective instruction of pupils subject to assignment by this Board, and the health, safety and general welfare of such pupils, and each of them, and for the proper utilization of the physical facilities presently available, it is our considered opinion conditions and circumstances are such that any departure from former policies would result in injustice to the children of both races, and, therefore, we decline the request for reassignment made by each of the following:

Carolyn Canion, from Whitted 7th grade
Earnestine Canion, from Whitted 8th grade
Major Junius Johnson, from Whitted 7th grade

Thurman L. Morgan, from Whitted 8th grade

Geardline Parker, from Whitted 7th grade
William Herbert Parker, from Whitted 8th grade

Francis Elaine Richardson, from Whitted 7th grade

Melvin Greenlee Whitted, Jr., from Whitted 7th grade

Joycelyn Dazelle McKissick, from Hillside 10th grade

"This decision is based on reactions to untried integrated schools in this administrative unit and in our State, general overcrowded conditions that prevail in Carr Junior High School and Durham High School that would necessitate the removal of pupils now properly assigned if the above requests for reassignment were granted. It is also our considered opinion that such a refusal will not develop harmful psychological effects to the children who have requested reassignment, but to grant such requests, or any of them would be harmful psychologically to a great many children of both races. We are further cognizant of the fact that the duty of this Board of Education is to provide educational advantages to all children in as orderly and safe a process as possible."

14. On September 4, 1957, Mr. Lew W. Hannen, Acting Superintendent of the Durham City Schools, wrote a letter to Mr. F. B. McKissick, father of Joycelyn McKissick, advising him that at the special meeting of the Board held on September 3, 1957, the application for change of pupil assignment for his daughter, Joycelyn McKissick, had been denied. On the same date, Mr. Hannen also wrote a letter to Mrs. Rachel Richardson, mother of Elaine Richardson, advising her that at the special session of the Board held on September 3, 1957, the application for change of pupil assignment for her daughter, Elaine Richardson, had been denied.

15. On September 7, 1957, within the time required by law, Messrs. C. O. Pearson, J. H. Wheeler, F. B. McKissick, M. Hugh Thompson and William A. Marsh, Attorneys, wrote the following letter to the Board of Education:

"As representatives of each individual parent and child listed below, we hereby respectfully request on behalf of each of them, a hearing on the rejection by you of each of these individual's request for reassignment. We are making this request for each individual pursuant to the Power of Attorney given each of us by the said individuals.

"These are the names of the parents and children for whom we respectfully request this hearing on behalf of each of them.

(Here was inserted the names of each pupil and parent, including the plaintiffs, Joycelyn McKissick and Elaine Richardson, whose

applications for pupil reassignment had been denied by the resolution of the Board on September 3, 1957).

"It is the feeling of these parents that their children live nearer schools than the one to which the children listed above have been assigned. Moreover, these parents feel that the children listed above are entitled to attend the school nearest their home on a nonsegregated basis and are therefore requesting this hearing before the School Board for the purpose of objecting to the rejection of their request for reassignment of these children to the school nearest them. We are sure that you realize that time is of the essence in this matter and we are hoping that the hearing will be granted promptly."

There is no evidence in the record that the Power of Attorney referred to was enclosed with the above letter, or that it was ever filed with or delivered to the Board of Education, or any member thereof.

16. On September 9, 1957, Mr. Lew W. Hannen, Acting Superintendent of the Durham City Schools, wrote a letter to Mr. C. O. Pearson, one of the attorneys for plaintiffs, acknowledging receipt of his letter of September 7, 1957, and stating that the board would hold a regular meeting on September 9, 1957, and that a time would be set for a prompt and fair hearing, and that he would be notified of the action.

17. On September 10, 1957, Mr. Hannen wrote Mr. Pearson the following letter:

"This is to notify you that the Board of Education in session September 9, 1957, has granted your request for a hearing regarding the denial of change of assignment for the nine pupils listed in your letter of September 7. The hearing has been set for Tuesday, September 17, at 7:30 p. m. in the School Board Room at Fuller School. We are notifying each of the five Negro principals who signed your letter."

18. At no time did the Durham City Board of Education ever request that the applicants, or anyone on their behalf, appear before the board.

19. On September 17, 1957, between 4:30 and 5:00 o'clock in the afternoon, Mr. William A. Marsh, Jr., one of the attorneys for the plaintiffs, delivered to Mr. Spurgeon S. Boyce, Chairman of the Board of Education, an "appeal" on behalf

of Evelyn McKissick, mother of Joycelyn McKissick, an "appeal" on behalf of Rachel Richardson, mother of Elaine Richardson, and an "appeal" on behalf of the parents of the seven other pupils. Each of the aforementioned "appeals" was in the following form:

"APPEAL

"Now Comes (name of parent) parent of (name of pupil), minor, through her counsel, C. O. Pearson, J. H. Wheeler, F. B. McKissick, M. Hugh Thompson and William A. Marsh, Jr., Attorneys at Law, whose said child was assigned by the Durham City Board of Education to a segregated school system on the basis of race, and hereby lodges an appeal to said Board and respectfully requests that this child be reassigned to the school nearest her on a nonsegregated basis.

"This child lives nearer a high school than the one to which she was assigned, and because of such assignment it creates a hardship on her parent and indeed on said child.

"May we direct your attention to the fact that by the assignment made of this minor to the same racially segregated school solely because of her race does irreparable damage to her personality and hinders her development in that it creates a feeling of inferiority and makes her feel that she cannot fully develop in the community as a first class citizen.

"May we direct your attention further to the fact that the U.S. Supreme Court has ruled that there can no longer be racial discrimination in public school facilities. Therefore, we respectfully request that this Board bring forth a plan to reorganize the school system in compliance with the decision in the cases under the title 'Brown, et al vs. the Board of Education' and assign this child to the school nearest her without regard to race."

20. The Durham City Board of Education met in special session on Tuesday, September 17, 1957, at 7:30 o'clock p. m., and considered, along with other business, the "appeals" of the parents of Joycelyn McKissick and the mother of Elaine Richardson, and the parents of the seven other pupils, all of whom had "appealed" from the action taken by the Board at the special session

held on September 3, 1957. Neither the parents of Joycelyn McKissick, nor the mother of Elaine Richardson, nor the parents of any of the other seven pupils, nor Joycelyn McKissick, nor Elaine Richardson, nor any of the other seven pupils, nor anyone for or on their behalf, appeared before the board in connection with the "appeals" for change of pupil assignment. The action by the board in regard to the "appeals" is noted in the official minutes of the meeting of the board on September 17, 1957, as follows:

"The Secretary read appeals filed by five attorneys for the nine Negro pupils, whose names are listed in minutes of September 3, 1957, seeking admission to Durham High School and Carr Junior High Schools. After some discussion it was decided to study the appeals carefully before giving an answer, and that an answer would be given at an early date, not later than the next regular Board meeting, October 14, 1957."

21. The Durham City Board of Education held a regular meeting on Monday, October 14, 1957, which was 28 days after the commencement of school. Neither the parents of Joycelyn McKissick, nor the mother of Elaine Richardson, nor the parents of the other seven pupils, nor any of the pupils, nor anyone for or on their behalf, appeared at this meeting in connection with the appeals for change of pupil assignment. At the said meeting, the board adopted the following resolution:

"After further careful consideration and investigation, The Board of Education of the City of Durham finds that the circumstances and conditions set forth in its resolution adopted September 3, 1957, have not changed.

"It is the firm belief of the members of the Board that any departure from their original conclusion based, once again, on factual conditions would render an injustice to all the school children involved. Therefore, for the time being the Board declines your appeal for reassignment presented September 17, 1957."

22. On October 15, 1957, the action taken by the board at its October 14, 1957, meeting was communicated to the plaintiffs by letter from Mr. Lew W. Hannen, Acting Superintendent of Durham City Schools, to Mr. C. O. Pearson, attorney for the plaintiffs.

23. By letter dated October 15, 1957, Mr. C. O. Pearson, counsel for plaintiffs, requested Mr. Charles F. Carroll, Superintendent of Public Instruction for the State of North Carolina, one of the individual defendants herein, to issue an order or directive demanding that the Durham City School Board cease and desist from discriminating against the plaintiffs, and to immediately reorganize the school system in the City of Durham on a non-racial basis. On October 18, 1957, Mr. Charles F. Carroll replied to Mr. Pearson's letter as follows:

"This is to advise you that under the Public School Law of the State of North Carolina (Chapter 115 of the General Statutes, Cumulative Supplement of 1955, as amended by the 1956 Extra and 1957 Regular Session Laws) I have no duty in this matter, and I have no authority relative to the matters contained in * * * your letters * * *."

24. Pursuant to a resolution adopted at a regular meeting held on August 11, 1958, notice of assignment of pupils for the school year 1958-1959 was given by publications in the Durham Morning Herald on August 13 and 20th, 1958. Under said resolution and assignment, the plaintiff, Joycelyn McKissick, was assigned to Hillside High School, and the plaintiff, Elaine Richardson, was assigned to Whitted Junior High School. Neither of the minor plaintiffs nor anyone on their behalf, made application to the Durham City Board of Education for change of pupil assignment for the 1958-1959 school year.

DISCUSSION

The questions presented by the foregoing facts are (1) whether the plaintiffs are entitled to have a three-judge court convened pursuant to the provisions of Title 28, Sections 2281 and 2284, United States Code, (2) whether the North Carolina State Board of Education, or the individual members thereof, are necessary or proper parties, (3) whether the plaintiffs were required to exhaust their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act prior to the institution of this suit, (4) whether the plaintiffs have exhausted their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act, and (5) whether the minor plaintiffs, or either of them, were refused reassignment on account of race or color.

I.

WHETHER THE PLAINTIFFS ARE ENTITLED TO HAVE A THREE-JUDGE COURT CONVENED PURSUANT TO THE PROVISIONS OF TITLE 28, SECTIONS 2281 AND 2284, UNITED STATES CODE.

While the plaintiffs pray in their complaint that a three-judge court be convened as required by Title 28, Sections 2281 and 2284, United States Code, for the purpose of restraining the enforcement of certain provisions of the Constitution and State Statutes of North Carolina which require or permit or result in racial segregation in public schools, this portion of the prayer for relief was apparently abandoned since it was not urged at any time during the course of the proceeding.

Both defendants in their answers deny the necessity for convening a three-judge court, and both allege, in substance, that the enforcement or execution of any constitutional provision or state statute requiring the segregation of pupils in public schools because of race or color would violate the Fourteenth Amendment to the Constitution of the United States and would be invalid. Neither defendant has defended by virtue of any law requiring the operation of segregated schools, and both contend that the convening of the three-judge court could only result in a re-statement of legal principles that have been decided time and again.

This entire subject was exhaustively treated by Judge Hayes in *Covington v. Montgomery County School Board*, D.C.M.D.N.C.1956, 139 F.Supp. 161, and my views were expressed in *Jeffers v. Whitley*, D.C.M.D.N.C.1958, 165 F. Supp. 951. Further, the North Carolina Supreme Court, in *Constantian v. Anson County*, 1956, 244 N.C. 221, 93 S.E.2d 163 acknowledges that the decisions of the Supreme Court of the United States in *Brown v. Board of Education of Topeka*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and *Brown v. Board of Education*, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, are authoritative in this jurisdiction, and that " . . . any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid." [244 N.C. 221, 93 S.E.2d 168.]

It is concluded that there has been a total failure on the part of the plaintiffs to demonstrate that any officer of the State of North Carolina has sought to deprive the plaintiffs, or other members of the class of persons which they rep-

resent; of any right by reason of a constitutional provision or statute requiring racial segregation in the public schools of the state, and that there is no necessity for convening a three-judge court.

II.

WHETHER THE NORTH CAROLINA STATE BOARD OF EDUCATION, OR THE INDIVIDUAL MEMBERS THEREOF, ARE NECESSARY OR PROPER PARTIES.

In passing on this question, the court is called upon to discuss a proposition that has been presented and ruled upon time and again.

The precise question was decided in the case of *Jeffers v. Whitley*, D.C.M.D.N.C.1958, 165 F.Supp. 951, and again in the case of *Covington v. Edwards*, D.C.M.D.N.C.1958, 165 F.Supp. 957, affirmed 4 Cir., 1959, 264 F.2d 780. In the *Jeffers* case, this court stated [165 F.Supp. 956]:

"After an exhaustive search of the public school laws of this state, I fail to find any provision giving the state officials any authority or control whatever over local school officials relating to the enrollment and assignment of pupils in the public schools."

The allegations in the complaint in this action, and the allegations in *Covington v. Edwards*, supra, as they relate to the North Carolina State Board of Education, are almost identical. It was held in the *Covington* case that the members of the North Carolina State Board of Education were neither necessary nor proper parties to the action, and this ruling was sustained by the Court of Appeals for the Fourth Circuit. *Covington v. Edwards*, 4 Cir., 1959, 264 F.2d 780. Indeed, it would appear that the plaintiffs now recognize the correctness of this ruling by their failure to propose any findings or conclusions against the North Carolina State Board of Education, or individual members thereof.

For the reasons stated, it is concluded that complaint against the individual defendants and the North Carolina State Board of Education should be dismissed.

III.

WHETHER THE PLAINTIFFS WERE REQUIRED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES UNDER THE NORTH CAROLINA ASSIGNMENT AND ENROLLMENT OF PUPILS ACT PRIOR TO THE INSTITUTION OF THIS SUIT.

It has been repeatedly held by this court and the Court of Appeals for the Fourth Circuit that the administrative remedies provided under the

North Carolina Assignment and Enrollment of Pupils Act must be exhausted before the courts of the United States will grant injunctive relief in suits of this type, and that such rights must be asserted as individuals, not as a class or group. *Carson v. Board of Education of McDowell County*, 4 Cir., 1955, 227 F.2d 789; *Carson v. Warlick*, 4 Cir., 1956, 238 F.2d 724; certiorari denied 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664; *Covington v. Edwards*, D.C.1958, 165 F.Supp. 957, affirmed 4 Cir., 1959, 264 F.2d 780, and *Holt v. Raleigh City Board of Education*, D.C.E.D.N.C.1958, 164 F.Supp. 853, 863 affirmed 4 Cir., 1959, 265 F.2d 95. Notwithstanding these holdings, the plaintiffs brought this action as a class action pursuant to Rule 23(a) (3) of the Federal Rules of Civil Procedure, to have declared the rights of the plaintiffs, and the class of persons they represent, to attend desegregated schools, and for injunctive relief.

[Similarity of Covington Case]

Again, the allegations in the complaint in this action, including the nature of the relief sought, and the allegations and relief sought in the *Covington* case are almost identical. Plaintiffs' present argument is completely and effectively answered in *Covington v. Edwards*, 4 Cir., 1959, 264 F.2d 780, 783, as follows:

"We are advertent to the circumstances upon which the plaintiffs rest their case, namely, that the County Board has taken no steps to put an end to the planned segregation of the pupils in the public schools of the county but, on the contrary, in 1955 and subsequent years, resolved that the practices of enrollment and assignment of pupils for the ensuing year should be similar to those in use in the current year. If there were no remedy for such inaction, the federal court might well make use of its injunctive power to enjoin the violation of the constitutional rights of the plaintiffs but, as we have seen, the State statutes give to the parents of any child dissatisfied with the school to which he is assigned the right to make application for a transfer and the right to be heard on the question by the Board. If after the hearing and final decision he is not satisfied, and can show that he has been discriminated against because of his race, he may then apply to the federal court for relief. In the pending case, however, that

course was not taken, although it was clearly outlined in our two prior decisions, and the decision of the District Court in dismissing the case was therefore correct."

In view of the above, it is too well settled to admit of argument that the plaintiffs were required to exhaust their administrative remedies under the Assignment and Enrollment of Pupils Act before applying to this court for injunctive relief.

IV.

WHETHER THE PLAINTIFFS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES UNDER THE NORTH CAROLINA ASSIGNMENT AND ENROLLMENT OF PUPILS ACT.

Before discussing this question, we need to remind ourselves again what the Supreme Court of the United States actually held in the *Brown* cases. As has been repeatedly stated, the *Brown* cases do not require integration, but only hold that states can no longer deny to anyone the right to attend a school of their choice on account of race or color. *Briggs v. Elliott*, D.C. E.D.S.C.1955, 132 F.Supp. 776; *Thompson v. County School Board of Arlington County*, D.C.E.D.Va.1956, 144 F.Supp. 239; *School Board of City of Newport News, Va. v. Atkins*, 4 Cir., 1957, 246 F.2d 325; *Covington v. Edwards*, D.C.M.D.N.C.1958, 165 F.Supp. 957, affirmed 4 Cir., 1959, 264 F.2d 780. Further, it should be borne in mind that if the Durham City Board of Education acted in an arbitrary and unreasonable manner, and there are some facts to support this contention, the plaintiffs are not left without a remedy. *Covington v. Edwards*, 4 Cir., 1959, 264 F.2d 780.

With these legal principles in mind, we now turn to an examination of the legal theory upon which this action was instituted and the steps taken by the plaintiffs to exhaust their administrative remedies under the state statutes governing the enrollment and assignment of pupils in the public schools. A lengthy and detailed discussion of the requirements of the state statutes governing the enrollment and assignment of pupils in the public schools of North Carolina, and steps that must be taken in the exhaustion of administrative remedies under these statutes, can be found in *Holt v. Raleigh City Board of Education*, D.C.E.D.N.C.1958, 164 F.Supp. 853, 863, affirmed 4 Cir., 1959, 265 F.2d 95, and a further discussion of these requirements is unnecessary.

[General Desegregation Sought]

While there is a general allegation in the complaint that the plaintiffs "exhausted administrative remedy of appeal to the defendants," it is apparent that what the plaintiffs are really seeking is a general order requiring the desegregation of the Durham City Schools rather than seeking, as individuals, admission to any particular school. In their prayer for relief, plaintiffs seek an injunction against the enforcement of certain constitutional provisions and state statutes requiring or permitting the operation of a racially segregated school system in the City of Durham and elsewhere in the State of North Carolina, and request that the defendants be required to promptly present a plan of desegregation to the court which will expeditiously desegregate the Durham schools. Another significant factor is that the plaintiffs do not even now request a finding or conclusion that either of the plaintiffs has exhausted her administrative remedies under the state statutes dealing with the enrollment and assignment of pupils, but rather ask that the court find and conclude that the statute has been administered by these defendants in a discriminatory, arbitrary and unreasonable manner. Further, in their applications for reassignment, neither of the minor plaintiffs sought admission to any particular school, but only requested reassignment to a school nearest their residence which was being operated on an integrated basis. Both minor plaintiffs stated they desired reassignment so that they could attend a school on a non-segregated basis. If the plaintiffs had any intention of even attempting a token compliance with the statutes dealing with the enrollment and assignment of pupils, it is inconceivable that they could not and did not list the school to which they desired reassignment, particularly in view of the fact that the application called for the name of the specific "school and grade to which assignment is requested." While the McKissick application gave the hour the applicant would have to leave home in the morning in order to attend the school to which assigned, it did not give the distance between the applicant's home and the school to which assigned, or the distance to any other school in the Durham City School system. The Richardson application gave no reason whatever as to why assignment was desired, other than to attend an integrated school, and gave no distance from the applicant's home

to any school in the City of Durham. Further, there was no evidence offered at the trial as to where the Richardsons lived, the distance to any school from their home, or any other information as to why reassignment was sought. The plaintiffs were represented by several competent attorneys before the 1957-1958 assignments were made by the Durham City Board of Education and throughout the entire period they were seeking reassignment, and it must be assumed that the procedure followed was deliberately calculated to give rise to a class action rather than an action on behalf of the individual plaintiffs to gain reassignment to a particular school.

[Failure to Attend Hearing]

One other significant factor is that the plaintiffs, after being denied reassignment on the basis of their original application, and after requesting and being granted a *hearing* on their applications, elected not to appear at the hearing, either personally or through counsel. The court is at a loss to know what the plaintiffs had in mind by filing a paper designated as an "appeal" on the late afternoon of September 17, 1957, a few hours before the scheduled hearing before the board. No such procedure is prescribed by the Assignment and Enrollment of Pupils Act, and there is no legal basis for substituting an "appeal" for the hearing provided by the statute.

In the final analysis, the plaintiffs in this case are proceeding upon almost the identical theory, and upon almost the identical allegations and contentions, as did the plaintiffs in the Covington case. There it was held by the Court of Appeals for this circuit that the case was ruled by the prior decisions of that court in the Carson cases, and that the district court was correct in dismissing the action. *Covington v. Edwards*, 4 Cir., 1959, 264 F.2d 780.

In view of the above, it is concluded that the plaintiffs failed, and indeed did not even attempt, to comply with the state statutes dealing with the enrollment and assignment of pupils, and are, therefore, not entitled to the relief sought. In deference to the plaintiffs, it should be pointed out that this case was actually tried before the pronouncements of the Court of Appeals in the Holt and Covington cases, but long after the holdings of this court in those cases and the holdings of the Court of Appeals in the Carson cases.

V.

WHETHER THE MINOR PLAINTIFFS, OR EITHER OF THEM, WERE REFUSED REASSIGNMENT ON ACCOUNT OF RACE OR COLOR.

Since the burden of proof was on the plaintiffs to establish by a preponderance of the evidence that they had exhausted their administrative remedies under state statutes before applying to the federal court for injunctive relief, and since they have failed to meet this burden, the court is not called upon to make a determination as to the reason the plaintiffs were denied reassignment. The failure of the plaintiffs to do their part under the applicable state statutes deprives the court of the opportunity of reaching the merits of the case. However, the conclusions herein reached are not to be considered as my condoning deliberate practices on the part of school boards which result in the perpetuation of enforced segregation in public schools. The court heartily disapproves the method employed by the Durham City Board of Education in giving assignment notices, and particularly the delay in making assignments. Some of the resolutions adopted by the board regarding the applications of these plaintiffs strongly suggest that reassignments were denied solely because of the race and color of the applicants. A different conclusion could easily have been reached had the plaintiffs performed the simple duties imposed upon them by state law before applying to this court for relief. Utmost good faith is required on the part of public officials, and the court should never condone dilatory practices or schemes designed to deny any citizen of his constitutional rights. On the other hand, when simple but positive duties are imposed upon a citizen before seeking relief in the courts, he

has the burden of establishing a good faith and adequate compliance with these duties before he will be heard to complain. Although it is not a part of the record in this case, it is heartening to know that many of the Durham City Schools were desegregated at the commencement of the 1959-1960 school year.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter herein.
2. The plaintiffs failed to exhaust their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act prior to the institution of this suit.
3. The plaintiffs are not entitled to the relief prayed for and the complaint should be dismissed.

However, in view of the fact that the plaintiff, Joycelyn McKissick, established at the trial that she lives less than $1\frac{1}{2}$ miles from the Durham High School and more than $2\frac{1}{2}$ miles from the Hillside High School, and that other students living in the immediate vicinity of her home are assigned to the Durham High School, the court will defer the entry of a judgment in conformity with this opinion for a period of ten days to give this plaintiff an opportunity to file a written motion requesting that the case remain on the docket for the purpose of giving her an opportunity to adequately exhaust her administrative remedies. Since there was a total lack of proof on the part of the plaintiff, Elaine Richardson, as to her residence, distance of any school in the Durham School system from her home, and other relevant factors, she is not entitled to be accorded the same privilege.

**EDUCATION
Public Schools—Tennessee**

Patricia HAYES, et al. v. COUNTY SCHOOL COMMISSION OF RUTHERFORD COUNTY, TENNESSEE, et al.

United States District Court, Middle District, Tennessee, Nashville Division, September 11, 1959, Civil Action No. 2767.

SUMMARY: Minor Negro school children and their parents brought a class action in federal district court against Rutherford County, Tennessee, school officials seeking a declaratory

judgment as to whether defendants' policy or practice in excluding plaintiffs and others, dependents of U. S. Air Force personnel, from public schools solely because of race or color pursuant to state law (a) violates the Fourteenth Amendment, (b) violates the Fifth Amendment in that the school from which plaintiffs are excluded is operated by the state with funds furnished by the United States government, and (c) unreasonably interferes with the exercise by Congress of its constitutional power to raise and support armies and to promote the national defense. The complaint, filed September 3, 1959, alleged that plaintiffs were excluded, solely because of race, from admission to a public school located adjacent to a U. S. government housing project operated as a part of an Air Force installation, in or near which project plaintiffs lived as dependents of Air Force personnel, although minor dependents of white military personnel were allowed to attend the school; and that plaintiffs were required to be transported to another school fourteen miles distant under described inconvenient, uncomfortable, and dangerous circumstances, because defendants are committed under the state constitution and statutes to a policy of compulsory racial segregation. Plaintiffs also requested a temporary injunction, alleging that they were suffering and threatened with irreparable harm. It was held on September 11 that plaintiffs had made a prima facie showing of deprivation of equal protection under the Fourteenth Amendment, and defendants having failed to appear on or before September 15 and show cause why preliminary injunctive relief should not be granted, the court granted the motion for relief beginning September 15 (pending final hearing of the action or further order), enjoining defendants from excluding plaintiffs and their class from the school. The court also ordered that after defendants had filed answer and prior to final hearing in the case, plaintiffs could apply for a preliminary injunction restraining defendants from enforcing racial segregation in the remainder of the county school system upon giving defendants five days notice, subject to defendants' right to make defenses. Defendants then moved for a postponement of the effective date of the preliminary injunction until the beginning of the 1960-61 school year because the complete integration of the school would have such an impact upon the previously non-integrated system that additional time was needed to make necessary plans and adjustments to accomplish an orderly transition. The court, holding that defendants had not carried their burden of showing facts or valid reason which would justify the delay sought, denied the motion and ordered the preliminary injunction continued in effect.

MILLER, J.

ORDER TO SHOW CAUSE WHY
TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION
SHOULD NOT ISSUE

In the above cause the plaintiffs having filed their verified complaint together with motions for a temporary restraining order and a preliminary injunction against the defendants, for the purpose of immediately restraining and enjoining them and each of them, their agents, employees, servants or attorneys, from refusing to admit the infant plaintiffs to the John Coleman School, or any other public school operated and/or maintained by said defendants in and for Rutherford County, Tennessee, on account of plaintiffs' race or color, pending further orders of the Court; and said motions being supported by the allegations contained in the complaint properly referred to and made a part thereof.

It is therefore ORDERED that the defend-

ants named in the caption of the complaint in this cause, and each of them, appear before the Honorable William E. Miller, U. S. District Judge, at 9:00 A.M., on Tuesday, September 8, 1959, in U.S. District Courtroom, Nashville, Tennessee, and show cause why the aforesaid temporary restraining order and/or preliminary injunction should not issue.

September 3, 1959.

ORDER

This cause came on to be heard before the Honorable William E. Miller, District Judge, upon the verified complaint as amended, the motions filed by the plaintiffs for a temporary restraining order and preliminary injunction against the defendants, the order heretofore entered by the Court directing the defendants to appear and show cause why said temporary restraining order and/or preliminary injunction

should not issue, the argument of counsel, and the entire record, from all of which the Court finds and holds that the plaintiffs have made a prima facie showing that they and all other persons similarly situated, are deprived of the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States by reason of their exclusion by defendants from admission to the John Coleman School situated in or near the town of Smyrna in Rutherford County, Tennessee; that the Court in the exercise of its discretion will allow defendants additional time as hereinafter specified to make further showing; and that plaintiffs are entitled to said immediate relief in the absence of a further showing by defendants within the time hereinafter specified.

It is, therefore, ORDERED that, unless the defendants appear before this Court on or before September 15, 1959 and show further cause why preliminary injunctive relief should not be granted, the said motion by plaintiffs for a preliminary injunction is granted to the extent that the defendants County School Commission of Rutherford County, Tennessee; W. J. Wood, Joe Cates, Robert Taylor, T. P. Burns, Rufus Johns, John G. Mitchell, Jim Smith, Jack Campbell, Floyd Lane, Rush Taylor, and Robert Rose, member School Commissioners of the County School Commission of Rutherford County, Tennessee; Ira Daniel, County School Superintendent and/or Superintendent of Public Instruction of Rutherford County, Tennessee; and Robert M. Hitt, Principal of John Coleman School, Smyrna, Tennessee, and their respective successors in office, together with their officers, agents and employees, and all other persons in active concert or participation with said defendants or their successors in office or any of them, who receive or have notice or knowledge of this order are hereby enjoined, beginning September 15, 1959 and pending final hearing of this action or until further order of this Court, from denying or refusing to admit the infant plaintiffs, or any other persons similarly situated, to the said John Coleman School, because of their race or color.

It is further ORDERED that the plaintiffs may at any time after the defendants have filed their answer and prior to the final hearing of this case, make application to the Court for a preliminary injunction restraining the defendants from enforcing racial segregation in the remainder of the public schools in the school system of

Rutherford County, Tennessee, upon plaintiffs furnishing five (5) days notice of such application to the defendants or their attorneys of record, but subject to the right of defendants to make any and all defenses thereto, including the challenge of the right of plaintiffs to seek such injunctive relief.

ORDER

This cause came on to be further heard before the Honorable William E. Miller, District Judge, upon the entire record and especially upon motion filed by the defendants to postpone the effective date of the preliminary injunction heretofore ordered to be issued by the Court on September 15, 1959, until commencement of the 1960-1961 school year, upon said order heretofore entered by the Court allowing defendants additional time to make further showing why said preliminary injunction should not issue, upon statements made by counsel for defendants in open court pursuant to said order, and upon argument of counsel in open court, from all of which the Court finds and holds that the defendants have not carried their burden of showing any facts or any valid reason whatsoever which would justify the delay sought by them, and that the said motion of defendants should therefore be denied, and said preliminary injunction should be continued in effect.

It is therefore ORDERED that said motion filed by defendants to postpone the effective date of the preliminary injunction heretofore ordered to be issued by the Court, be and the same is hereby denied, and, further that the defendants County School Commission of Rutherford County, Tennessee; W. J. Wood, Joe Cates, Robert Taylor, T. P. Burns, Rufus Johns, John G. Mitchell, Jim Smith, Jack Campbell, Floyd Lane, Rush Taylor, and Robert Rose, member School Commissioners of the County School Commission of Rutherford County, Tennessee; Ira Daniel, County School Superintendent and/or Superintendent of Public Instruction of Rutherford County, Tennessee; and Robert M. Hitt, Principal of John Coleman School, Smyrna, Tennessee, and their respective successors in office, together with their officers, agents and employees, and all other persons in active concert or participation with said defendants or their successors in office or any of them, who receive or have notice or knowledge of this order are hereby enjoined, beginning September

15, 1959 and pending final hearing of this action or until further order of this Court, from denying or refusing to admit the infant plaintiffs,

or any other persons similarly situated, to the said John Coleman School, because of their race or color.

EDUCATION

Public Schools—Texas

Hilda Ruth BORDERS, a Minor, by her Father and Next Friend, Louie Borders, et al. v. Dr. Edwin L. RIPPY, as President of the Board of Trustees of the Dallas Independent School District, Dallas County, Texas.

United States District Court, Northern District, Texas, Dallas Division, Civil Action No. 6165, August 4, 1959.

SUMMARY: In a class action, Negro school children in Dallas County, Texas, sought a declaration of rights and injunctive relief in a federal district court relating to their admission to county public schools on a nonsegregated basis. After extended litigation [see summary at 3 Race Rel. L. Rep. 17 (1958)] the court issued an order requiring desegregation to be commenced at the January, 1958, term. 2 Race Rel. L. Rep. 985 (1957). On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded with instructions that before a specific date should be fixed or orders or judgments entered to require desegregation, "the school authorities should be accorded a reasonable further opportunity promptly to meet their primary responsibility." 250 F.2d 690, 3 Race Rel. L. Rep. 17 (1957). On August 4, 1959, the district court denied a motion by plaintiffs for an order requiring defendants immediately to desegregate. The court stated that defendants had made a prompt and reasonable start and were proceeding toward a good faith compliance with pertinent judicial orders and judgments; that they were pursuing legal remedies under 1957 Texas legislation [2 Race Rel. L. Rep. 695 (1957)], which remedies they had not exhausted; and that it was physically impossible and impracticable to integrate the schools by the beginning of the fall term of the 1959-60 year. The court held that some further time should elapse before its decision on a definite date for desegregation in order that new conditions, developments, and evidence might be considered, but that defendants should take steps to call an election as provided by the 1957 legislation, and such other steps as are possible to comply with present federal court decisions. Jurisdiction was retained for such further hearings and proceedings and the entry of such orders and judgments as might be necessary or appropriate to require compliance with the instant order.

DAVIDSON, District Judge.

ORDER

BE IT REMEMBERED that, on the 30th day of July, A. D. 1959, came on regularly to be heard the Motion of Plaintiffs for further relief, and came the parties by their attorneys and announced ready for trial, whereupon the pleadings were presented, evidence was adduced, and statements were made by counsel.

The Court is of the opinion and so finds that

the Defendants believe in the Constitution and the laws and the Courts of both this State and the United States of America and that their actions and conduct amply support such belief; that the Defendants have not only made a prompt and reasonable start but are also proceeding toward a good faith compliance at the earliest practicable date with the May 17, 1954 ruling of the Supreme Court and the judgments of the United States Court of Appeals, Fifth Circuit, as well as the judgments and orders of this Court entered pursuant thereto; and the De-

Defendants' actions constitute good faith implementation of all governing Constitutional principles; that Defendants have diligently studied the problems involved and the methods and plans used elsewhere in a genuine effort to avoid the strife and violence which have taken place in some areas; that the Defendants have and are pursuing all of their legal remedies with reference to an Act of the 1957 Texas Legislature, approved by the Governor on the 23rd day of May, 1957, and such legal remedies have not been exhausted as yet; that it is physically impossible and impracticable to integrate the schools by the beginning of the fall term of this year, and that when desegregation is put into effect, it should begin with the fall term of some year because it is physically impossible and impracticable to integrate at the mid-term of the schools, and that, therefore, the best interests of both white and colored scholastics requires that desegregation be not put into effect now or at the beginning of the next scholastic year which begins in September next, and that desegregation at this time or in September would bring about unnecessary confusion, chaos and an almost complete breakdown in school education for both white and colored if instituted for the scholastic year 1959-60; and that some fur-

ther time should elapse before the Court decides on a definite date for desegregation in order that new conditions, developments and evidence might be considered; but that the Defendants should take the initial steps necessary by circulating petitions to call an election as provided by the 1957 Act of the Texas Legislature, and such other steps and studies as are possible to comply with the present decisions of the Federal Courts; that counsel for the Plaintiffs stated in open Court that desegregation should not be put into effect this year.

IT IS FINALLY ORDERED:

That the prayer of the Plaintiffs for an order directing and requiring Defendants to immediately desegregate is denied; but this Court retains jurisdiction of this cause for such further hearings and proceedings and the entry of such orders and judgments as might be necessary or appropriate to require compliance with this Order as well as the judgment of the Appellate Courts, and this hearing is recessed for the time being to be resumed on the first Monday in April, A. D. 1960.

ENTERED this, the 4th day of August, A. D. 1959.

EDUCATION

Public Schools—Texas

DALLAS INDEPENDENT SCHOOL DISTRICT v. J. W. EDGAR et al.

Court of Civil Appeals of Texas, Eastland, October 2, 1959, 328 S.W.2d 201.

SUMMARY: The Dallas Independent School District, under federal court order to desegregate its schools [see 3 Race Rel. L. Rep. 17 (1958), 4 Race Rel. L. Rep. 877, *supra* (1959)], brought suit in federal district court against the Texas State Commissioner of Education and other state officials, seeking a declaratory judgment determining its rights under two state statutes. One statute provides that if a school district abolishes racial segregation in schools without an election it shall be ineligible for accreditation or any foundation program funds, and that any person who violates the statute shall be guilty of a misdemeanor, 2 Race Rel. L. Rep. 695 (1957). The other, the "Pupil Placement Act", authorizes local school boards to assign pupils to schools on the basis of standards set out therein. 2 Race Rel. L. Rep. 693 (1957). The district court dismissed the suit, and the Court of Appeals for the Fifth Circuit affirmed, on the grounds that there was neither a justifiable controversy nor a federal statute giving the district court jurisdiction over the action. 255 F.2d 455, 3 Race Rel. L. Rep. 656 (5th

Cir. 1958). The school district and its trustees then filed suit in a state district court against the same defendants, asking for a declaration as to the applicability of the statutes to the plaintiff in view of the federal court desegregation orders. The trial court dismissed the case and the Court of Civil Appeals affirmed. It was held that, as plaintiffs had not attacked the statutes' constitutionality, a court could not decline to apply them to plaintiffs because such action would violate the state constitutional prohibition against suspension of state laws except by the legislature. It was also held that the suit was in reality against the state and so could not be maintained without legislative consent.

WALTER, Justice.

Dallas Independent School District and its trustees filed suit against the Commissioner of Education of the State of Texas and other State officials for a declaration of law as to the applicability of Article 2900-a, Vernon's Ann. Texas Civ.St., and Article 2901-a, V.A.T.C.S., to its district in view of the judgment of a Federal Court which ordered said school district to desegregate the schools under their jurisdiction "with all deliberate speed".

Article 2900-a provides, in effect, that if any school authority should abolish the dual public school system without an election, it shall be ineligible for accreditation and ineligible to receive any Foundation Program Funds and further provides for a fine against those violating such statute. Article 2901-a provides for student transfers within and without the district without racial implications.

Attorney General Will Wilson filed an answer for the defendants setting up a plea to the jurisdiction and a plea in abatement, which pleas were sustained and judgment was entered dismissing the case.

The Dallas Independent School District has appealed from such judgment asserting (1) its suit was not prohibited by Section 28, Article 1 of the State Constitution, Vernon's Ann.St., (2) its suit was not against the State and the State's consent was not necessary, (3) that the school district and its trustees have a justiciable interest in this suit for a declaratory judgment.

[Courts Must Apply Statutes]

Appellants do not attack the constitutionality

of said statutes under either the state or federal constitution. Appellants, in effect, have pleaded that said statutes are valid, but ask that they be construed as not applying to it because of the Federal Court order. Without declaring said statutes unconstitutional or invalid, the courts cannot decline to apply them to the Dallas Independent School District. To do so would be contrary to Section 28, Article 1 of the Constitution of Texas which provides, "No power of suspending laws in this State shall be exercised except by the Legislature."

The appellants first sought a declaratory judgment in the federal court on the same subject matter presented in this case. The court sustained the action of the District Court in dismissing the complaint of the Dallas Independent School District and said, "There is obviously no justiciable controversy stated here." *Dallas Independent School District v. Edgar*, 5 Cir., 255 F.2d 455.

Appellants' suit is in reality a suit against the State of Texas which cannot be maintained without the consent of the legislature. Appellants contend no such consent is necessary in this case because their suit is only for the purpose of declaring the rights and duties of state officers. We cannot agree with such contention. *San Antonio Independent School District v. State Board of Education*, Tex.Civ.App., 108 S.W.2d 445 and *Bryan v. Texas State Board of Education*, Tex.Civ.App., 163 S.W.2d 837 (Ref.W.O.M.).

We have examined all of appellants' points and find no merit in them and they are accordingly overruled. The judgment is affirmed.

EDUCATION

Public Schools—Virginia (Arlington)

Clarissa S. THOMPSON et al. v. COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, et al.

United States District Court, Eastern District of Virginia, September 10, 16, 1959, Civil Action No. 1341.

SUMMARY: The Virginia Pupil Placement Board in 1958 denied the applications of 30 Negro students to transfer to "white" Arlington schools. A federal district court, on review, however, ordered the admission of four but stated that it could not be said then that the other 26 had been rejected without substantial supporting evidence. 166 F.Supp. 529, 3 Race Rel. L. Rep. 931 (E.D. Va. 1958). Subsequent to the invalidation of the state's "massive resistance" program [see *Harris v. Day*, 200 Va. 439, 106 S.E.2d 636, 4 Race Rel. L. Rep. 65 (1959) and *James v. Almond*, 170 F.Supp. 331, 4 Race Rel. L. Rep. 45 (E.D. Va. 1959)], the Court of Appeals for the Fourth Circuit remanded the case as to the 26, with directions to issue an injunction ordering the county school board to re-examine their applications 264 F.2d 945, 4 Race Rel. L. Rep. 296 (1959). When 22 of the 26 renewed their applications for the 1959-60 school year, the school board again denied them. On applicants' petition for review, the district court, while approving the criteria for assignment used by the board, found that two of the criteria had not been uniformly applied as to twelve petitioners who were, therefore, ordered admitted to specific white schools, but the motion for a desegregation plan was denied as the court's order provided relief contemplated by the plan. —F.Supp. —, 4 Race Rel. L. Rep. 609 (E.D. Va. 1959). Subsequently, sixteen other Negro children were permitted to intervene as parties plaintiff. Upon a motion for summary judgment, the court ordered the board to examine their applications for transfer and/or enrollment, previously filed, and to report on or before September 7, 1959, as to action taken and reasons therefor. When the report as filed failed to state any grounds for denying the applications of seven of the intervenors, the court, noting that they resided in the districts of the white schools to which they sought admission, enjoined defendants from refusing so to admit them. A hearing upon remaining issues raised by a motion for further relief was postponed, and it was provided that the other nine intervenors should be admitted *pendente lite* to schools to which they had been previously assigned without prejudice to a determination of their rights at the later hearing. [For previous developments as to Arlington public school desegregation, see 1 Race Rel. L. Rep. 890 (1956); 2 Race Rel. L. Rep. 59, 300, 810, 987 (1957); 3 Race Rel. L. Rep. 187, 931 (1958); 4 Race Rel. L. Rep. 36, 296 (1959)]. The court's orders issued in September, 1959, are printed below.

BRYAN, District Judge.

ORDER

This cause came on to be heard on the 2nd day of September, 1959, on the motion of Alice A. Brown, et al to intervene herein as parties plaintiff and thereupon, counsel for defendants having advised the Court that defendants do not oppose said motion, it was by the Court ORDERED that the motion of Alice A. Brown, et al to intervene herein as parties plaintiff be and it hereby is granted and it was FURTHER ORDERED, upon consideration of the intervenors' oral motion for summary judgment and the representations made in open court by counsel for the respective parties, that the defendant

County School Board of Arlington County should, pursuant to and consistent with the previous orders of this Court in this cause, examine the applications for transfer and/or enrollment for the 1959-60 school session, previously submitted by the sixteen intervenors herein; that counsel for the said intervenors be advised, on or before September 7, 1959, of the action taken on their respective applications after said examination, together with the reasons therefor; that a report of said actions, with the reasons therefor, be filed with the Court by the defendant School Board on or before September 7, 1959; that any and all exceptions or objections to the said report be filed with the Clerk of this Court within five (5) days after the filing of the said report; and that any and all exceptions and

objections so filed be heard by the Court on the earliest convenient date thereafter, upon notice to the respective parties.

The Court retains jurisdiction of this cause for the purpose of enforcing this order and any prior order, as well as to enlarge or restrict any of said orders, from time to time, and to grant further relief, general or special, in said cause. September 10, 1959

ORDER ON REPORT FILED SEPTEMBER 8, 1959

This cause came on to be heard the 14th day of September, 1959, again upon the Motion for Further Relief filed herein by plaintiffs on September 8, 1959 after the oral order of the court on September 2, 1959, which is now recited in the written order of September 10, 1959, directing the defendants on or before September 7, 1959 to advise the movants, and report to the court, the action taken by the defendants on the applications of the movants for transfers, and was argued by counsel.

It appearing from the Report to the Court duly filed herein by defendants on September 8, 1959 (September 7 being a legal holiday), that defendants upon examination of the said applications oppose the admission of Alice A. Brown, Elliott A. Brown, Mabra V. Brown, Marcia Brown, Jewel Green, Rosemarie Carmichael, Lillian L. Thompson, William Walker, and Deloris Wright into the schools to which they have applied, but that the said report gives no ground for refusing the admission of Oliver Brown, Jr., Sheila Roberta Eldridge, Jacqueline B. Faggins, Brenda B. Faggins, Joyce Battle,

Bernard C. Hamm, and Delores E. Spinner into the schools to which they have applied, and it also appearing to the court from its examination of said applications that the last-named seven pupils reside in the districts of the schools hereinafter named, and that the said applications and the action thereon disclose no ground for refusing these pupils admission to the schools of their residence districts, it is

ORDERED that the defendants, their successors in office, agents, representatives, servants and employees be, and each of them is now restrained and enjoined from refusing to admit, enroll or educate plaintiffs Oliver Brown, Jr., Jacqueline B. Faggins, Brenda B. Faggins, Joyce Battle, Bernard C. Hamm, and Delores E. Spinner to, or in, Stratford Junior High School, and plaintiff Sheila Roberta Eldridge to, or in, Patrick Henry Elementary School; and it is further

ORDERED that a hearing upon the remaining issues raised by plaintiffs' Motion for Further Relief be and it hereby is continued to another day to be fixed; provided, that the movants not herein afforded immediate relief may be admitted, enrolled and educated, pendente lite, in the schools to which they have heretofore been assigned, without prejudice to the determination at the aforesaid hearing of any and all rights which they have heretofore asserted or may hereinafter assert; and

The Court retains jurisdiction of this cause for the purpose of enforcing this order and any prior orders, as well as to enlarge or restrict any of said orders, from time to time, and to grant further relief, general or special, in this cause. September 16, 1959.

EDUCATION

Public Schools—Virginia (Charlottesville)

Doris Marie ALLEN etc., et al. v. The SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, et al.

United States District Court, Western District, Virginia, March 30, 1959, September 5, 1959, Civil Action No. 51.

SUMMARY: Negro children in Charlottesville, Virginia filed class actions in a federal district court, seeking admission to white schools. An injunction forbidding discrimination against plaintiffs was issued [1 Race Rel. L. Rep. 886 (W.D. Va. 1956)] and was affirmed by

the Court of Appeals for the Fourth Circuit. 240 F.2d 59, 2 Race Rel. L. Rep. 59 (4th Cir. 1956); *cert. denied*, 353 U.S. 910, 2 Race Rel. L. Rep. 300 (1957). On September 13, 1958, the district court ordered the immediate admission of 12 named plaintiffs, and the Court of Appeals refused to stay the effective date of the order. On September 19, the governor of Virginia closed the schools. On October 9, the district court enjoined the use of public funds to pay teachers in private schools in Charlottesville. _____ F.Supp. _____, 3 Race Rel. L. Rep. 937 (W.D. Va. 1958). On January 29, 1959, the Chief Judge of the Court of Appeals for the Fourth Circuit stayed the September 13 decree, on the condition that defendant school officials submit to the district court within 20 days their plan for later compliance with it. 263 F.2d 295, 4 Race Rel. L. Rep. 39 (4th Cir. 1959). The plan, filed on February 18, provided for tutoring the 12 plaintiffs so that they might reach the academic level ordinarily achieved from a full year session prior to September, 1959, when they were to be admitted to the white schools specified in the September 13 decree. Racial discrimination in admission practices in general was prohibited. It was also provided that each elementary school would serve the geographical district shown on an attached map in furtherance of an aim to limit pupils to 30 per classroom and adjust transportation problems; but that a pupil could be assigned to a school outside his district if he and his parent should prefer such and it be found consistent with his academic best interests and not violative of the numerical enrollment limitation. Concerning high school pupils, it was provided that a pupil-teacher ratio limited to 23 be aimed for, but that, with this purpose, convenience of attendance, and academic qualifications in mind, the superintendent in enrolling such pupils might consider pupil and parent preference. Provisions covering all pupils were also made for requesting a transfer after an assignment, and for factors to be considered by the superintendent in acting upon transfer requests. No objections were offered to the plan, which the court, on March 30, approved and ordered carried out; but the case was retained on the docket for possible future action. Subsequently, defendants moved the court for instructions in view of action by the state Pupil Placement Board disapproving assignments of pupils made by the city school board and directing the assignment of those pupils to schools other than those to which the city board had assigned them. On September 5, 1959, the court affirmed the order of September 13, 1958, and directed that it be carried out subject to rights of interested persons who felt aggrieved by the city board's assignments to appeal to the court. The desegregation plan and the court's subsequent orders follow.

School Desegregation Plan

Recognizing that under the provisions of Section 133 of the Constitution of Virginia, as construed by the case of *Harrison v. Day*, the School Board of the City of Charlottesville has the responsibility of supervising the public schools of this city and believing that it can discharge that responsibility only by operating all the public schools under its jurisdiction in accordance with applicable decisions of the Courts of this State and of the United States, it is Resolved by the School Board of the City of Charlottesville to cease all practices of racial discrimination in the assignment of pupils to the various public schools of this city and to that end to commit itself to a plan of desegregation, to be submitted to the United States District Court for the Western District of Virginia for approval, upon the following particulars:

I. All assignments to schools commencing in September 1959 shall be in accordance with this plan.

II. In view of the fact that the twelve (12) plaintiffs in the case of *Doris Marie Allen et al. v. The School Board of the City of Charlottesville, Virginia et al.* ordered admitted to Venable Elementary School and Lane High School by Order of the United States District Court for the Western District of Virginia entered on September 13, 1958 have so far received little or no academic instruction during the 1958-59 school session, the Superintendent shall arrange for suitable instruction for them in the form of tutoring by qualified teachers, at such places and under such schedules as he may determine, in order to make it

possible for such students to gain as soon as practicable and prior to September 1959 the degree of academic achievement ordinarily prescribed for the 1958-59 session. Such pupils shall be admitted to regular classes in the schools specified by the Order at the session commencing in September 1959, or prior thereto in the case of any individual among them whom this board in its judgment may find to be sooner qualified to perform satisfactory work in the class to which admission has been ordered.

III. No pupil shall be denied admission to any public school of this city on the ground of race or color, and in order that all assignments and requests for transfers may be made and acted upon in an orderly and non-discriminatory way the Superintendent shall arrange for the enrollment of pupils so that each school bears, so far as is reasonably possible, a relatively equal share of the total school enrollment, taking into account such objective factors as (a) the physical facilities of the school and its available teaching personnel and (b) its location, particularly as hereinafter provided.

(a)

(1) So far as is reasonably possible, the Superintendent shall limit the pupil enrollment in all elementary school classrooms to a maximum of thirty (30) pupils per classroom.

(2) So far as is reasonably possible, the Superintendent shall limit the pupil-teacher ratio in each high school to a maximum of twenty-three (23) pupils per teacher.

(b)

Each elementary school shall serve the geographical district in which it is located as shown on the attached map of Elementary School Districts of the City of Charlottesville and since such districts have been designed to accomplish the purposes expressed in paragraph (a) (1) just above as well as to adjust to problems of transportation to and from the elementary schools, assignments to such schools shall in general be made from the districts respectively served by them. Also, the Superintendent may assign any pupil to a school outside of his district when

the pupil and his parent or guardian indicate such a preference provided the Superintendent finds that such assignment would be consistent with the best academic interests of the pupil and not in violation of the purposes of paragraph (a) (1) just above.

In enrolling high school pupils, the Superintendent may consider the preference indicated by the pupil and his parents or guardian but in all cases shall be guided by the purposes of paragraph (a)(2) just above, as well as objective considerations related to convenience of attendance and academic qualifications.

IV. Upon assignment of any pupil to a school, his parents or guardian may request a transfer to another school and such request shall be acted upon promptly and fairly by the Superintendent after he has taken into account such factors as his residence, his academic qualifications, his personal desires, his needs for particular courses, the enrollment at the various schools, their available teaching personnel and their physical facilities and other lawful and objective considerations. The pupils' academic qualifications shall be considered in order to determine whether the transfer would be detrimental to his best academic interests and to this end the Superintendent shall rely upon the pupil's school record when it is sufficient for the purpose or cause him to take any standard academic or achievement test when his school record is not sufficient for the purpose.

V. The Superintendent may adopt such administrative procedures as he may think advisable to further the purposes of this plan so long as they are applicable to white and negro pupils alike and to the same extent in the case of one as in the case of the other; and in the adoption of administrative procedures in the furtherance of this plan and related to pupil assignments the Superintendent shall define and publish them in such detail as may be necessary to advise all pupils and their parents or guardians of assignments and transfers so as to enable them to raise such objection as they may have as far as possible in advance of the time when such assignments and transfers shall take effect.

Order of March 30

The defendants in this case, in accordance with directions of the United States Court of Appeals for the Fourth Circuit, have heretofore on the 18th day of February, 1959, filed a proposed plan for the elimination of segregation in the public schools of the City of Charlottesville, Virginia, along with a map of newly created school districts for the elementary schools of said city and the plaintiffs, after a full opportunity to study said plan and map, have indicated that they do not desire at this time to offer any objections to the plan submitted by the defendants.

It appearing to the Court that the parties hereto are endeavoring to resolve the problems incident to the desegregation of the public schools of said city in a spirit of cooperation and mutual trust, and that they desire that the defendants have a reasonable opportunity to put the plan as formulated by them into execution without further directions at this time by the Court,

It is, therefore, the judgment of this Court that the aforesaid plan be accepted and ap-

proved and that the defendants be directed to put into operation and carry out said plan of desegregation of said schools as submitted to the Court.

However, because of the possibility that problems may arise in connection with the operation of said plan not now apparent, but which may develop when said plan is put into operation and due to the uncertainty of the future course of the State of Virginia upon the matter of desegregation of public schools it is deemed desirable that this case be kept upon the docket of the Court for future action if and when any future action herein may be necessary.

Now, therefore, it is **ORDERED** that the defendants shall proceed to carry out the plan of desegregation of the schools as submitted to the Court and that this case be retained upon the docket, with leave to both plaintiffs and defendants to seek such further advice or orders as circumstances in the future may require.

John Paul
District Judge.

Order of September 5

This matter having come on to be heard this 5th day of September, 1959, upon the motion of the defendants for further instructions in regard to their responsibilities and duties under the orders of this court, question thereto having arisen in the minds of the defendants because of the action of the Pupil Placement Board, created under the statutes of Virginia, in disapproving the assignment of certain pupils as made by the School Board of the City of Charlottesville and directing the assignment of said pupils to other than those to which they were assigned by said school board.

And it appearing that notice of said motion for instructions was duly served upon the Pupil Placement Board and no appearance having been made by that Board or any person on behalf thereof.

And the court having considered the request of the School Board for instructions in regard to its duties in the premises.

Now, therefore, it is **ORDERED** that the order entered herein on September 13,

1958, directing the admission of certain plaintiffs to previously all white schools in the city of Charlottesville be, and the same is hereby affirmed, and is directed to be carried out, subject to the rights of the plaintiffs, or any other persons interested, to appeal to this court if they feel themselves aggrieved by the assignments made by the City School Board whether they be among the original plaintiffs in this case or other persons.

And it appearing to this court that it is the duty of the School Board of the City of Charlottesville, as well as its desired intention, to carry out the plan of desegregation of schools which was submitted to this court and approved by an order of March 30, 1959,

It is **ORDERED** that said plan be held to be continued in effect and to be complied with in future assignments of pupils to the schools of the City of Charlottesville.

It is further **ORDERED** that the attempt of the Pupil Placement Board

to assign pupils contrary to the recommendation of the City School Board be disregarded and held to no avail as being contrary to the

orders of this court and the Court of Appeals of this circuit.

John Paul
District Judge.

EDUCATION

Private Schools—Maine

Alden W. SQUIRES et al. v. Inhabitants of City of AUGUSTA, H. Lloyd Carey, Mayor, and Leo F. Dunn, treasurer.

Supreme Judicial Court of Maine, May 25, 1959, 153 A.2d 80.

SUMMARY: A bill in equity was brought by certain taxable inhabitants of Augusta, Maine, against the inhabitants, mayor, and treasurer of the city, seeking to enjoin them from effectuating provisions of a city ordinance purporting to authorize the city to make available at public expense transportation to and from private schools, for the health, safety, and welfare of the children attending those schools in fulfillment of state compulsory school attendance laws. The superior court dismissed the bill, and the plaintiffs appealed. The state Supreme Judicial Court, two justices dissenting, sustained the appeal. The court noted that the state constitutional provision imposing on the legislature the duty to promote the cause of education had been interpreted as giving the legislature "full power" over the subject, and it called attention to various statutory provisions indicating that the legislature had seen fit to make pupil transportation a component part of a "complete" educational program. However, it was held that, since the city had only such authority as the legislature had given it, and since no statute or charter provision had been enacted to authorize the passing of a ordinance providing for transportation of private school pupils, the city council lacked authority to enact the ordinance in question and the order appropriating \$250 for the purposes so provided was unlawful. The contention that the ordinance was justified by the city's police power was rejected because it is not a proper exercise of such power to attempt to do something which was unauthorized by the state legislature and would defeat the legislature's intent, or something which would be repugnant to and in derogation of the state's established policy in its general scheme for the promotion of education. The court did not reach the issue of the constitutionality of the ordinance and order under the First and Fourteenth Amendments to the United States constitution; and *Everson v. Board of Education*, [330 U.S. 1 (1947)] was distinguished as it did involve the constitutionality of a statute authorizing local school districts to provide transportation for private school pupils and a resolution passed thereunder.

EDUCATION

Private Schools—New York

Application of BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF TOWNS OF BALLSTON, CLIFTON PARK and CHARLTON, Saratoga County and the TOWN OF GLENVILLE, Schenectady County, New York, Petitioner, v. James E. ALLEN, Jr., as Commissioner of Education of the State of New York, Respondent, and Martin Brophy et al. Intervenor-Respondents.

Supreme Court of New York, Special Term, Albany County, July 9, 1959, 192 N.Y.S.2d 186.

SUMMARY: At a meeting of a New York school district, motions by certain individuals that public transportation be provided for their children attending parochial schools were defeated. Appeals were sustained by the state commissioner of education, who thereupon ordered the district to furnish transportation for appellants' children "to the school they legally attend," provided it is the nearest available school of their denomination and is located between two and eight miles from their residences. (The New York Education Law authorizes the commissioner to require transportation for school children "to and from the schools they legally attend within the district" if in his judgment such is required because of remoteness of the school to the pupil or "for the promotion of the best interests of the children.") In proceedings brought by the district to have the legality of those orders determined, the state supreme court held that (1) the voters, by amending the state constitutional prohibition against use by the state of property, credit, or public money in aid or maintenance of a denominational school, so as to permit the legislature to "provide for the transportation of children to and from any school or institution of learning", had determined that public funds may be constitutionally spent for transportation to non-public schools; and (2) the federal constitution was not violated by the orders, under the decision of the United States Supreme Court in *Everson v. Board of Education*.

ELLSWORTH, Justice

These are article 78 proceedings which raise issues as to the legality and constitutionality of orders of the Commissioner of Education requiring the expenditure of public funds for the transportation of pupils to parochial schools.

At the annual meeting of the Central District held on May 6, 1958, motions to provide such transportation were defeated. Appeals were taken to the Commissioner and sustained. In the Brophy and Greiner proceeding the Board of Education of the Central District was ordered "to proceed to provide transportation for the appellants' children to the school they legally attend, provided such children are attending the nearest available parochial school of their denomination, and provided further that such school is located more than two and less than eight miles from their residences, and pay the reasonable cost thereof out of any moneys of the district which are available for such purpose." A similar order was made in the Adack proceeding.

[A Multi-barrelled Attack]

Petitioner herein makes a multi-barrelled attack upon the orders. It contends that so far as

it is concerned there is no finality and conclusiveness in the orders of the Commissioner despite the provisions of section 310 of the Education Law. It bases such contention upon the argument that section 310 only binds the person initially seeking relief before the Commissioner. The position of petitioner does violence to the plain meaning of the statute; is not dictated by reason or logic; and is not sustained by precedent or construction of the statute. Board of Education of Union Free School District No. 3 of Town of Oyster Bay, Nassau County v. Allen, 6 N.Y.2d 871, 188 N.Y.S.2d 988. Finality and conclusiveness, unless purely arbitrary, adhere to orders of the Commissioner of Education under section 310 irrespective of which party initiated the appeal.

Finality and conclusiveness also attach to the determination of the Commissioner that he has statutory power to order the transportation here involved. Petitioner says that the power to order such transportation does not apply to central school districts and to transportation to schools outside of such district. The Commissioner bases his powers upon section 3635 of the Education Law which reads in part "In providing or granting transportation for children pursuant to the

provisions of this chapter, sufficient transportation facilities . . . shall be provided for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children." The determination is entirely correct, since section 1807 of the Education Law is not a limitation upon the power to order transportation to schools outside the central district.

Petitioner's most serious ground of attack is that the orders violate the state and federal constitutions. It is conceded that such question of a constitutional nature is here reviewable, and the Commissioner decided that such question should be left to the courts.

[Authorization by Amendment]

Undue emphasis is placed by petitioner on *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E.2d 576, 118 A.L.R. 789, which held unconstitutional the use of public funds for transportation to non-public schools. Subsequent to that decision the 1938 constitutional convention proposed an amendment to what is now article

11, section 4 of the State Constitution to permit the state legislature to provide for the expenditure of public funds for the transportation of children to and from any school. Such amendment was approved by the voters at the general election of 1938 and became effective January 1, 1939. Therefore, the people of the State of New York have determined that the use of public funds for transportation to non-public schools is a constitutional expenditure.

The argument that the orders here in question violate the federal constitution also falls. *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, determined that a state may provide for the expenditure of public funds for the transportation of pupils to a non-public school without violating the First and Fourteenth amendments to the federal constitution. Petitioner seeks to distinguish the New Jersey statute from the New York statute and also on the facts. The distinctions made are not valid and material and the *Everson* case is deemed decisive.

Accordingly, the petitions are dismissed without costs.

Submit orders accordingly.

EDUCATION

Colleges and Universities—New York

Arthur STEIER v. NEW YORK STATE EDUCATION COMMISSIONER, New York City Board of Higher Education and Brooklyn College.

United States Court of Appeals, Second Circuit, September 22, 1959, 271 F.2d 13.

SUMMARY: A former student in Brooklyn College, a New York City public college, brought an action in federal district court under the federal civil rights statute against the state education commissioner, the city board of higher education, and the college, claiming that in having been suspended from the college he had been deprived of liberty without due process and refused equal protection of the law, contrary to the Fourteenth Amendment. A motion to dismiss for failure to state a claim against the board and the college or to show the deprivation of any right secured to plaintiff by federal law or the Constitution was treated as a motion for summary judgment, and was granted. 161 F.Supp. 549 (E.D.N.Y. 1958). On appeal, the evidence indicating that plaintiff had been suspended, reinstated on probation, suspended again and finally dismissed for persistent and abusive criticism of college officials and for violation of rules and regulations, the Court of Appeals for the Second Circuit affirmed, one judge dissenting. The two judges for affirmance stated different reasons therefor. One judge supported the decision to affirm on the ground that there is no federal jurisdic-

tion over such matters. Characterizing education as "a field of life reserved to the individual states" restricted by the federal government only by the requirement that states may not discriminate against an individual because of race, color, or creed, he declared that the civil rights statute must not be expanded so as to provide a federal court review for every person dismissed from a state college, for such application would arrogate to federal courts that which is "purely a State Court function" and would be "contrary to the Federal nature of our system." The other judge for affirmance was of the opinion that the district court had jurisdiction but that summary judgment was properly granted in favor of defendants because the record before that court revealed no material fact issue requiring trial. He further stated that although the Fourteenth Amendment protects individuals against state action constituting purposeful discrimination not based on a permissible classification, no such discrimination had been shown in this case, since any other equally disruptive student would apparently have been likewise dismissed. Noting the alleged denial of procedural due process relative to administrative hearings reviewing the dismissal, the concurring judge said that the Fourteenth Amendment does not guarantee judicial due process in such proceedings and there was no suggestion of a fundamental lack of fairness. Neither, he added, had plaintiff's right to free speech been impaired, as he might still speak and write, subject only to restraints imposed upon every other individual.

EDUCATION

Colleges and Universities—Tennessee

Ralph PRATER, Sammie Burnett, Marvis LaVerne Kneeland, and Harriet Roddy, infants, by next friends, on behalf of themselves and others similarly situated, Petitioners, v. Honorable Marion S. BOYD, United States District Judge for the Western District of Tennessee, Respondent.

United States Court of Appeals, Sixth Circuit, February 17, 1959, 263 F.2d 788.

Ralph PRATER, et al. v. STATE OF TENNESSEE BOARD OF EDUCATION, et al.

United States District Court, Western District, Tennessee, Memphis Division, August 4, 1959, No. 3550.

SUMMARY: Negro residents of Memphis, Tennessee, instituted an action against the state board of education and others in federal district court to enjoin enforcement of a resolution of the state board denying the immediate admission of plaintiffs to Memphis State University. Plaintiffs filed a formal motion for a preliminary injunction, defendants moved to dismiss, and the court set a date to hear the latter motion. Plaintiffs then brought proceedings under the All Writs Act, in the Court of Appeals for the Sixth Circuit, seeking mandamus to compel the district judge to hear their motion prior to defendants' motion. The Court of Appeals issued a show cause order, to which the district judge answered that, following hearing and action on the dismissal motion, he expected to hear and act on the injunction motion "as soon thereafter as possible." Stating that the power to issue the writ of mandamus is discretionary and that its use against a judge is a drastic and extraordinary remedy, the appellate court declined to rule that the district judge had abused his discretion in deciding to hear the motion to dismiss first, especially when the scope of the problem raised by the dismissal motion indicated the desirability of determining it before the other motion. The order to show cause was discharged and the petition was dismissed. Subsequently, the district court found that as the order of the state board which the plaintiffs had sought to enjoin "expires by its own terms" so as not to prohibit the enrollment of plaintiffs and other qualified

Negroes at the University's September, 1959, term, and as the University president, the state board, and attorney general had all indicated that such persons would not be discriminated against but would be admitted at that term, the case may be moot. Noting additionally that injunctions should be used sparingly against state and local officials undertaking in good faith to abide by their legal obligations, the court postponed to a future date the further consideration of the pending motions for injunctive relief, the parties to have the right to petition the court for action on the motions in the meanwhile if it should become necessary to protect rights.

COURT OF APPEALS

PER CURIAM.

Invoking the authority of this Court under the All Writs Act [28 U.S.C. § 1651], petitioners here seek a writ of mandamus to compel the respondent Judge to hear their motion for a preliminary injunction in Civil Action No. 3550 now pending in the United States District Court for the Western District of Tennessee, Memphis Division, wherein petitioners are plaintiffs and the "State of Tennessee Board of Education," the "Members of the State Board of Education of Tennessee," and the President and the Registrar of Memphis State University, are defendants.

It is alleged in the complaint in Civil Action No. 3550, a copy of which is attached to the petition here, that as "Negro citizens of the United States, State of Tennessee, and residents of . . . the City of Memphis" petitioners have "satisfied all requirements for admission" and are "entitled to immediate enrollment in Memphis State University, which is under the jurisdiction, management and control of the Defendants", but have been denied admission.

The complaint prays, *inter alia*: "That the Court advance this case upon the docket and order a speedy hearing of same forthwith . . . That the Defendants herein be temporarily and permanently enjoined from executing, enforcing, or in any way effectuating the resolution, directive, and/or authorization of the Board of Education of the State of Tennessee denying the immediate admission to Memphis State University to the Plaintiff[s] herein."

[Motions Filed]

The plaintiffs in Civil Action No. 3550 have filed therein a formal "Motion for Preliminary Injunction", and the defendants have filed a "Motion to Dismiss".

It was conceded at the bar upon oral argument that State colleges and universities in Tennessee, other than Memphis State University,

admit eligible negro students. See: *Booker v. State of Tennessee Board of Education*, 6 Cir., 240 F.2d 689, certiorari denied 1957, 353 U.S. 965, 77 S.Ct. 1050, 1 L.Ed.2d 915.

The record does not show, as asserted by petitioners, that the respondent Judge has refused to hear petitioners' motion for a preliminary injunction. In fact, it shows the contrary. Before the petition here was filed, the respondent Judge had set defendants' motion to dismiss for hearing on February 20th next; and the return and answer made by the respondent Judge to the order to show cause issued pursuant to our Rule 29, 28 U.S.C.A. [28 U.S.C. § 1651(b)] declares that; "Respondent expects to hear and act on said motion at that time. As soon thereafter as possible, respondent intends to hear and act on the motion for the temporary injunction."

It appears from what was said at the hearing before us on February 10th that what petitioners desire by writ of mandamus from this Court is to compel a hearing and determination of their motion for a preliminary injunction in advance of the hearing and determination of defendants' motion to dismiss on February 20th.

[Motion to Dismiss: Grounds]

The record discloses that one of the grounds advanced in the District Court in support of the motion to dismiss is that: "The statutes of Tennessee provide for the review of the action of the State Board of Education by writ of certiorari in a proceeding which is administrative or legislative in character, and the plaintiffs should be required to exhaust this [State] remedy before invoking the injunctive powers of . . . [the Federal] Court" [See: Sections 27-901 to 27-906 T.C.A.; *Odle v. McCormack*, 1947, 185 Tenn. 439, 206 S.W.2d 416; *Prentis v. Atlantic Coast Line Co.*, 1908, 211 U.S. 210, 229-230, 29 S.Ct. 67, 53 L.Ed. 150; *Bacon v. Rutland R. Co.*, 1914, 232 U.S. 134, 137, 34 S.Ct. 283, 58 L.Ed. 538; *Hawks v. Hamill*, 1933, 288 U.S. 52, 60-61, 53 S.Ct. 240, 77 L.Ed. 610; *Natural Gas Pipeline*

Co. v. Slattery, 1937, 302 U.S. 300, 310-311, 58 S.Ct. 199, 82 L.Ed. 276; Lane v. Wilson, 1939, 307 U.S. 268, 274, 59 S.Ct. 872, 33 L.Ed. 1281; Railroad Commission of Texas v. Pullman Co., 1941, 312 U.S. 496, 500-501, 61 S.Ct. 643, 85 L.Ed. 971.]

Of course the motion to dismiss is not before us and we intend no intimation as to the merits of the motion. The material just cited on the subject is merely to indicate the scope of the problem presented to the respondent Judge upon that motion and the possible basis for his discretionary decision to hear it in advance of the motion for a preliminary injunction.

[Discretionary Writ Sparingly Used]

There can be no doubt that mandamus will lie to compel a District Court having jurisdiction to proceed in the due exercise thereof. *La Buy v. Homes Leather Co.*, 1957, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290; *Ex Parte Parker*, 1887, 120 U.S. 737, 743, 7 S.Ct. 767, 30 L.Ed. 813. But, as we observed in *Black v. Boyd*, 6 Cir., 1957, 248 F.2d 156, the power to issue the writ is discretionary and is "sparingly exercised." [248 F.2d at page 159.]

Moreover, the Supreme Court has admonished that use of the writ of mandamus against a judge is a "drastic and extraordinary" remedy [*Ex Parte Fahey*, 1947, 332 U.S. 258, 259, 67 S.Ct. 1558, 1559, 91 L.Ed. 2041] which is "meant to be used only in the exceptional case where there is clear abuse of discretion * * *." *Bankers Life & Cas. Co. v. Holland*, 1953, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed. 106.

Here the respondent Judge is proceeding in the exercise of the District Court's jurisdiction, and we cannot say there has been any abuse of discretion in his determination to hear the motion to dismiss on February 20th, in advance of the application for a preliminary injunction. Indeed the questions raised by the motion to dismiss point to the desirability of hearing and determining the motions in the order stated.

The order to show cause is discharged and the petition is dismissed with costs in this Court to respondent.

DISTRICT COURT ORDER

BOYD, J.

This cause came on for hearing upon the several motions to dismiss heretofore made by the

defendants, the motion of the plaintiffs for a summary judgment, upon documentary and oral evidence in support of said motions, and the arguments of counsel, from all of which the Court made an oral finding and ruling which is ordered transcribed and filed, and is made a part of the record. The Court finds and holds that the order of the defendant State of Tennessee Board of Education which the plaintiffs seek to enjoin expires according to its own terms so as not to prohibit in any way the enrollment of plaintiffs and other qualified Negro students at the September, 1959 term of Memphis State University. That the President of Memphis State University has stated in open court that all qualified Negro students, including the four plaintiffs, will not be discriminated against, and will be admitted to Memphis State University at said September, 1959 term or semester. That none of the plaintiffs is an applicant for admission to any present term or semester of said University to which they could be ordered admitted, but that all of the pending applications of said plaintiffs are for admission at the September, 1959 term or semester. That the Attorney General has stated in open court that he has advised the defendant State Board of Education that there is no longer any lawful excuse for the State Board to exclude qualified Negroes from the University and that said Board is reconciled to the enrollment of Negro students at said University at the next September semester. That defendant's several motions to dismiss raise factual and legal questions which may be substantial. That there may be issues of fact which would prevent plaintiffs from prevailing in their motion for summary judgment. That to proceed with the further hearing of this cause would serve no useful purpose and could possibly delay the final determination of the same for another year or more. That, in view of the testimony in open court, the case may be moot. That the Court has considerable discretion in the ordering of injunctions and that the same should be sparingly employed against State and local officials who appear to be mindful of their obligations under the law, and undertaking, in good faith, to abide thereby.

The Court further finds that the record supports the conclusion that plaintiffs will be admitted to Memphis State University without any discrimination against them on account of race at the September 1959 term of said school, for which they have application for admission pend-

ing, and is of the opinion that further consideration of the pending motions should be postponed to a future date, with the right in the parties to petition the Court for action thereon should this become necessary to protect the rights of any of the parties.

It is accordingly ordered that the hearing on the pending motions and the further consideration thereof is hereby postponed to a future date with the right in the parties to petition the Court for further hearing and action on said motions as justice and equity may require.

EDUCATION

School Bonds—Florida

THE BOARD OF PUBLIC INSTRUCTION OF LAKE COUNTY, FLORIDA FOR AND ON BEHALF OF SPECIAL TAX SCHOOL DISTRICT NUMBER ONE OF LAKE COUNTY v. THE STATE OF FLORIDA and others.

Fifth Judicial Circuit Court, Lake County, Florida, October 15, 1959.

SUMMARY: A Florida county school board petitioned a state circuit court for a decree sustaining the validity of bonds of a special tax school district allegedly approved at a special election. Certain taxpayers interposed opposition to their validation. The court found that the board had failed to comply substantially with numerous statutory procedural requirements concerning the election and issuance of the bonds, and so refused to approve the bonds' validity. The court added, however, that even if those requirements had been met, the bonds still would have been invalid because of the board's expressed intention to continue with separate schools for Negro and white children contrary to the United States Constitution as interpreted in the *School Segregation Cases*. Further, the conclusion was reached that "it is impossible under prevailing conditions to issue and sell any valid bonds for school purposes," there being no valid Florida constitutional provision to authorize it. Inasmuch as the article requiring the legislature to "provide for a uniform system of public free schools" also specifies that "white and colored children shall not be taught in the same school," the court reasoned that the framers of the state constitution intended that effect could not be given to one provision without giving effect to the other; and since the segregation section had been made ineffective by court decisions, the entire article on education must fail.

FUTCH, Circuit Judge.

THIS CAUSE is presented to the Court by petition of the Board of Public Instruction of Lake County, Florida, seeking decree of this Court declaring valid bonds of Special Tax School District Number One, alleged to have been approved at a special election ordered by said Board and held on May 26th, 1959, for the issuance and sale of bonds for said district in the principal sum of \$5,600,000.00.

Both the factual and legal phases of the question here involved have been ably presented to the Court by counsel for the Board of Public Instruction, as well as those representing individual tax payers who have interposed opposition to the validation of bonds, and by Messrs.

Rantson Davis and P. B. Howell, Jr., who at the request of the Court, presented briefs and arguments as friends of the Court.

The Board, by the allegations of its petition and the exhibits attached thereto, and by apt words made a part thereof, and sketchy evidence produced at the hearing, attempted to show full compliance with the Constitution and laws of Florida relating to the issuance and sale of such bonds.

The proceedings for the issuance of such bonds is wholly statutory since the Constitution delegates to the legislature the duty of establishing such proceedings by law. Hence the proceedings as established by statute must be substantially complied with.

[Taxpayers Due Consideration]

The whole gravamen and purpose of the Constitution and such statutes as are in accord with and valid under its terms is to give the actual taxpayer the right to say whether or not he is willing to bear the extra tax burden incident to the issuance of such bonds. Therefore, the rights and protection of the taxpayer must be given first consideration. There are always those enthusiasts for money for schools and other public expenditures, many, if not a majority, of whom pay little or no tax for any county purpose, who never consider the tax burden.

So it is that public officials should, and the Courts must be ever alert to the rights and interests of the taxpayer who will be charged with the burden sought to be imposed.

[Statutory Requirements Unfulfilled]

The law provides the methods by which an election of this nature may be initiated, to wit: (1) By petition of a certain number of the freeholders of the district; (2) By the trustees of the district; (3) By the County Board of Public Instruction.

The record here shows that neither method was used in this case, but indicates initiation by the State Department of Education. (See Petitioner's Exhibit A, and as also appears from the testimony of Superintendent L. J. Jenkins, given at the final hearing.)

The law requires publication of the resolution by the Board of Public Instruction which initiates the proceedings for the election by fixing the amount of the proposed bond issue and calling for an election. This was not done.

The Board required a "re-registration of freeholders" for the proposed election. The law requires publication of notice of such re-registration and this was not complied with in accord with the law.

The law requires notice of the proposed election to be published for a minimum number of days. This was not complied with.

The Board of Public Instruction, while demanding re-registration of freeholders, undertook to use the permanent voting list as well, for voting purposes, by stating in its notice for re-registration that a freeholder who was registered on the general registration books could present proof of being a freeholder to the election officials would be allowed to vote. This procedure is available only before the Supervisor of Regis-

tration prior to the registration books (re-registration only) being sent out to the election officials in the voting precincts. (See State vs. Board of Public Instruction, 113 So. (Fla.) 368.)

While the definition of freeholder as contained in Section 100.241, Florida Statutes, 1957, is faulty and inadequate, under the provisions of the Constitution, it is not nearly so faulty as the procedure prescribed by paragraph D of Section 100.241, Florida Statutes, 1957, which permits an elector to establish his status as a freeholder by simply presenting to the registration officer "tax receipt showing payment of taxes on property in his name." It will be noted that this provision indicates no date for the tax receipt, and so far as the law is concerned, the tax receipt might be for the current year or it might be ten years or older. The second method of establishing the status of the freeholder is by producing a deed or a certified copy thereof, of property in his name. There is no requirement that the deed be recorded, or that the property described therein be actually owned by the applicant, or that the deed is in fact valid and not fictitious. The third method is by sworn affidavit of ownership, giving either a legal description, or the address and location of the property in the applicant's name. This throws the situation wide open for fraudulent representations and fraudulent voting in elections concerning bond issues. As to the definition contained in paragraph one of said Section 100.241, it fails to meet the common or legal definition of a freeholder. The Constitution is the voice of the people, and the words there used must be taken in their common, every day meaning to the average citizen, and to him a freeholder is one who owns real property or real estate. This section of the Statute is therefore, in the opinion of this Court, unconstitutional and void.

[Other Irregularities]

The petition of the Board of Public Instruction in this case shows conclusively that a large number of people were allowed to qualify and vote who had not re-registered, but who had registered on the regular registration books of Lake County and who presented to the inspectors of the election, and not to the Supervisor of Registration, the proofs mentioned in Paragraph D of Section 100.241.

The law also provides for the certification by the Supervisor of Registration of the number of

qualified electors who are freeholders, which was not done.

The law further requires that the return of the election shall be canvassed by the Board of County Commissioners and the results thereof certified to the Board of Public Instruction by the Board of County Commissioners. (See Section 100.271 Florida Statutes, 1957.) In this instance the Board of Public Instruction canvassed the returns of the election themselves and certified the results thereof to themselves.

The law requires the proposal to issue bonds to be approved by the State Board of Education. The testimony of the Honorable J. L. Jenkins, Superintendent of Public Instruction, in and for Lake County, Florida, shows clearly that this was not done. Mr. Jenkins testified (Page 5 Transcript of Testimony) that the proposed bond issue was presented to the financial and legal advisor of the State Department of Education and that they, the financial adviser and the legal adviser, gave approval in the name of the State Board of Education.

The law also requires that the Superintendent of Public Instruction of the county make a report to the Board of Public Instruction showing the amount and necessity for the bonds. This was not made to appear and have been done in this instance.

In the opinion of this Court, there has not been a substantial compliance with the statutory requirements by the Board of Public Instruction of Lake County, Florida, in this instance, and in fact there has been a substantial failure to comply with the statutory requirements and that the whole proceedings concerning the election and issuing of the bonds is void, and that the validity of the bonds proposed cannot be approved by this Court.

[Bonds Invalid Under Brown]

If, however, all of the proceedings of the Board of Public Instruction had been strictly in compliance with the statutes, the bonds would still be invalid and could not be approved as valid by this Court, because we run squarely into the insurmountable obstacle of the Constitution of the United States of America as interpreted by the Supreme Court of the United States in *Brown versus Board of Public Instruction*, 347 U.S., 483; 74 Sup. Ct. 686, and subsequent decisions and opinions rendered by that Court following strictly the decision and ruling as laid down in the *Brown* case above cited.

The Supreme Court of the State of Florida, in the case of *State vs. Fowler* (1956), 86 So.2d 419, stated forcefully that the question of separate but equal facilities for the education of white and colored children, has no place for mention or consideration in the issuance of bonds for school purposes. Yet in this instance, the Board of Public Instruction of Lake County, Florida, by resolution providing for the election and issuance of the bonds here in question, specifically injected this question into the resolution adopted by the Board, in the necessary ground work or foundation for this particular bond issue, and in the published notice of election.

[Resolution Shows Segregation Aims]

The Board, by its resolution proposing the issuance of bonds, adopted on the 10th day of February, 1959, specifically and definitely projected into these proceedings the intention of said Board to continue with separate schools for white and colored children, in that they provide specific amounts to be expended from the proceeds of such bonds issued, for seven Negro schools, as follows:

"Carver Heights High School	\$ 300,000.00"
"Dabney Elementary School	28,000.00"
"Eustis Vocational School	335,000.00"
"Lincoln Park School	52,000.00"
"Milner Rosenwald Academy	100,000.00"
"Leesburg Negro Elementary School	220,000.00"
"South Lake Negro High School	295,000.00"
	<hr/>
	1,330,000.00

Two of the Negro Schools mentioned and specifically designated as such by the Board,—the Leesburg Negro Elementary School, and the South Lake Negro High School—and for which specific allotments are made, are to be *new* institutions. The other five, Carver Heights High School, Dabney Elementary School, Eustis Vocational School, Lincoln Park School, and Milner Rosenwald Academy, are separate Negro schools, as shown by the evidence taken in this case. (Transcript p. 13-14.)

As much as this Court, as well as every other right-thinking individual, both white and negro, who understands this situation, deplors the possibility of co-mingling the children of the two races in school, there is no way by which we can

escape, in view of the Brown case (*supra*), and that is particularly true in this instance where the Board of Public Instruction, standing by its convictions, and the convictions of a vast majority of both races, make bold in the face of the decisions of the Supreme Court of the United States to announce their intention of continuing separate facilities as provided for by the Constitution and Statutes of the State of Florida prior to the Brown and subsequent decisions.

[Supreme Court Ruling Binding]

There is no question of the effectiveness of the opinion and judgment of the Supreme Court of the United States on this subject, and so long as such is the opinion and judgment of that Court, not only this Court, but every other Court in the State of Florida, as well as the citizens of the state, are duty bound and, as a matter of law, required to observe it. We have no choice left other than to discontinue public free schools, or to integrate.

The provision for "separate but equal" facilities had been the law of the land since the decision of the Supreme Court of the United States, in the case of *Plessy vs. Ferguson*, 165 U.S. 537, 16 S.Ct. 1138, handed down in 1895. In fact, this provision had been in effect and recognized for so long that it had in effect, become part and parcel of the Constitution of the United States and the law of the land to the same extent as if written therein, and accepted as such until the advent of the present personnel of that Court. The opinion in the Brown case, *supra*, was based, not on law, but upon what the Court was pleased to call "psychological knowledge", giving as a basis for that decision, the following:

"we come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."

It is respectfully suggested that judges are, or should be, selected on the basis of their knowledge of the law, and not on the basis of their knowledge of psychology.

[Brown Decision Criticized]

The Supreme Court, in the Brown case, cited only two court decisions, or precedents as they

are called, which had to do, *not with wholesale mixing*, but with individual applicants, one being an individual Negro who sought admission to a segregated law school, and the other being an individual Negro who sought admission to a white graduate school.

The Court, in announcing its rejection of the law establishing the right of the states to provide separate but equal facilities in public schools, and in furtherance of its use of psychology, rather than law, in its decision and judgment, stated as follows:

"Whatever may have been the extent of psychological knowledge at the time of *Plessy vs. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy vs. Ferguson* contrary to this finding is rejected." Footnote 11 on Page 692, 74 Sup. Ct. Reports gives the authority for this statement.

The author of this theory which the Court approved must be of the same school as the psychologist of ages gone by, who, suffering from compassion with the lowly ass, and seeking to improve his status, dug a pit for the mare and contrived the breeding of the first mule—that monstrosity which nature refused to adopt and which has neither pride of ancestry nor hope of posterity.

Perhaps a similar result for the schools of the South is sought by the integrationists.

As insurmountable as the obstacle now appears to be, we may find some glimmer of consolation in the words of Justice Frankfurter in his concurring opinion in the case of *Cooper vs. Aaron*, 78 S.Ct. 1401, text page 1412, second column, where he says: "Even this Court has the last say only for a time. Being composed of fallible men, it may err." We also know that the man with the long beard and scythe has a way of eliminating obstructions.

The same author, in the same opinion, also says: "local customs, however hardened by time, are not decreed in Heaven." He might just as logically have added: neither are the opinions and decisions of the Supreme Court of the United States of America.

[Effect on Florida Constitution]

Regardless of the lack of logic, and the necessity of ignoring or expressly over-ruling all precedent in arriving at the various segregation decisions by the present personnel of the

Supreme Court of the United States, they have the effect of repealing the constitutional provisions of the State of Florida relative to education as set forth in Article XII and the various amendments thereto.

Again quoting from *Cooper vs. Aaron*, the Supreme Court of the United States has this to say:

"It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, Paragraph 3 'to support this Constitution.' * * * * *

"No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery * * *.'" *Cooper vs. Aaron* (Supra), text page 1410.

The rule of construction applicable to the Constitution is, and so far as I know, has always been that an article must be considered in its entirety and not section by section. The Constitution of Florida, adopted and approved by the people of the State of Florida, contains Article XII covering the subject of education so far as the Constitution is concerned. Article XII was originally composed of 15 sections, 13 of the 15 sections being devoted to details of management and finance, and two sections of Article XII form the real foundation for the system of public free schools in the State of Florida. They are Sections 1 and 12. Together, they form the keystone of the arch of the covenant of the people with the state for a system of public free schools, without which there could not have been and would not be, any free public school in the State of Florida.

[Florida Constitution Quoted]

Section 1 provides that "the Legislature shall provide for a uniform system of public free

schools, and shall provide for the liberal maintenance of the same." Section 12 provides that "white and colored children shall not be taught in the same school, but impartial provision shall be made for both." Sections 2 and 3 provide for state administration. Sections 4, 5 and 7 provide a permanent nucleus or foundation for the support. None of these sections have been amended. All other sections have been amended at least once. One section has been repealed and two sections, 10A and 17, have been added, while a proposed new section has been defeated.

Thus it is that the Constitution adopted by and expressing the will of the people of the State of Florida, provided for the liberal maintenance of a uniform system of public free schools for each of the two races, separate and apart from each other, and effect cannot be given to either one of these two sections without giving effect to the other. Beyond question, the intent of the farmers of Article XII of the Constitution, and of the people of the State of Florida when they adopted it as part of the Constitution, was to provide "for the liberal maintenance of a uniform system of public free schools for both white and 'colored children, separate and apart from each other.'" In other words, the system was intended to be composed of two separate lines, with liberal and impartial provision for each.

[Education Article Void]

The Supreme Court of the United States, having declared Section 12 to be "unconstitutional", it follows that the entire article is void, and of no effect. Hence, it is impossible under prevailing conditions, to issue and sell any valid bonds for school purposes, and the justices of the United States Supreme Court would hasten to decree the bonds in this instance invalid because the intent to disregard their edict is expressed by the Board of Education in their proceedings relative to the issuance of these bonds as above shown.

There are no valid constitutional or statutory provisions now in existence in Florida under which these bonds could be legally issued or under which this Court could, by its decree, validate the bonds here in question even had the statutory provisions and requirements been strictly and completely followed.

Now, therefore, it is:

ORDERED, ADJUDGED, AND DECREED, that the proceedings had and taken in and about

the proposed issuance of bonds in the sum of \$5,600,000.00 by the Board of Public Instruction of Lake County, Florida, for Special Tax School District Number One of said County are void of validity and effect, and the petition for validat-

ing said bonds be and the same is dismissed, and entry of decree validating said bonds refused.

DONE, ORDERED, ADJUDGED, AND DECREED, at Tavares, Lake County, Florida, this 27th day of August, A.D. 1959.

EDUCATION

Teachers—Delaware

BOARD OF EDUCATION, LAUREL SPECIAL SCHOOL DISTRICT v. Alonzo Hilton SHOCKLEY, Jr.

Supreme Court of Delaware, November 9, 1959, 155 A.2d 323.

SUMMARY: A Negro public school principal, having teacher tenure under state law, was discharged by the board of education of a Delaware school district on grounds of wilful and persistent insubordination. After a public hearing, held at the principal's request, the board upheld its previous decision. However, on appeal, a state superior court set the board's decision aside and ordered reinstatement; and the board appealed to the state supreme court. The latter court found the board's insubordination finding to be supported by substantial evidence, in that appellee had been employed as "Principal and Teacher", but for the last year and a half of his tenure he had refused to obey oft repeated instructions by his superintendent to teach two classes while carrying on administrative duties. The case was therefore remanded to the superior court with instructions to vacate its order. However, it was also held that the board had erred in refusing to permit the principal to offer evidence concerning a 1957 board meeting at which he had been questioned about an application that he had made for his daughter to be admitted to a "white" public school, which evidence he contended would show that the insubordination charge was not a bona fide one but only a subterfuge to cover up a decision made at the 1957 meeting to discharge him because of the transfer application. The court ruled that, particularly because the board acted in the 1958 hearing both as prosecutor and judge, the principal must be given an opportunity to testify as to circumstances indicating an existing bias by the board against him; and to that end the superior court was instructed to remand the case to the board, which was directed to hear only such testimony and to determine whether or not the board had been guilty of bias, and to dismiss or sustain the charges accordingly.

BRAMHALL, Justice.

This appeal relates to the questions: (1) Was there substantial evidence of wilful and persistent insubordination within the meaning of the Teacher's Tenure Act?; (2) Was the action of the Board in refusing to admit certain evidence and to make an offer of proof with reference thereto error?

Appellee, defendant below, has been continuously employed by the Department of Public Instruction for the State of Delaware since September 1, 1948, and by the Board of Edu-

cation of the Laurel School District since September 1, 1950. Appellee has teacher tenure status under Title 14, Del.C. § 1403.

• • •

[The court reviewed the evidence and found that there was sufficient evidence of insubordination as charged.]

Appellee's second objection related to the refusal of the Board to permit appellee to testify, and to make an offer of proof, relative to a meeting of the Board on September 5, 1957, at which meeting appellee had been requested to be, and was, present. It is alleged by appellee

that at that meeting he was questioned concerning an application which he had made for his Negro daughter to be admitted into the Milford white school. Counsel for the Board objected to this testimony and to the offer of proof. Counsel for appellee contended that it was pertinent to the charge of wilful and persistent insubordination upon which appellee was being tried. After the Board had sustained this objection appellee proceeded to make an offer of proof. Before the offer was completed counsel for the Board objected to the offer and was sustained. In his brief before this court, although he did not specifically so state at the hearing, appellee contended that this evidence was admissible as showing that the charge of wilful and persistent insubordination was not a bona fide charge against appellee but was a charge brought against him by the Board as a subterfuge because he asked to register his Negro daughter in a white school and that the Board first decided to terminate the services of appellee at the September meeting.

[Unbiased Board Required]

No authority is needed to show that appellee should have been permitted to complete his offer of proof and that he should have been given an opportunity to prove any bias existing on the part of the Board. The need for an unbiased Board, particularly in view of the fact that the Board was acting not only as prosecutor but as judge, is too apparent to be questioned. To refuse such offer was error which must be corrected.

The case must go back to the Board for the purpose of permitting appellee to submit testimony in support of said offer. As we understand

appellee's offer, it was his purpose to show circumstances occurring at the hearing on September 5, 1957, which would have indicated bias and prejudice on the part of the Board against appellee, that the real charge against him was in asking to enroll his Negro daughter in a white school and that the charge of wilful and persistent insubordination was a subterfuge to cover up the charge made on September 5, 1957. We therefore direct that the Board shall permit appellee to present testimony of any circumstances taking place at that meeting showing bias or prejudice on the part of the Board. Such testimony shall be limited to that purpose alone. No other evidence shall be received. The Board shall hear such testimony and make its determination. If it should sustain appellee's contention, then the charges against appellee shall be dismissed; otherwise, they will be sustained and the finding of the Board will be affirmed.

[Incongruity Noticed]

We appreciate the incongruity in directing the Board to sit in determining whether or not it was guilty of bias. Unfortunately, under the statute we see no other way by which this question may be determined. We have confidence that the Board will give appellee a fair hearing and make a just determination of this question. In any event, its determination, if adverse to appellant, will be reviewable by the Superior Court.

The order of the Superior Court of April 27, 1959, is reversed, and the case is remanded to that court with instructions to vacate its order and to remand the case to the Board for further proceedings in accordance with this opinion.

EDUCATION

Teachers—West Virginia

Anna STARLING v. BOARD OF EDUCATION FOR COUNTY OF MINGO; W. T. Floyd, Jr., Superintendent of Schools, J. B. Pitcock, William M. Adair, Tom B. Varney, C. Fred Shewey, and O. B. Glenn.

United States District Court, Southern District, West Virginia, at Huntington, August 12, 1959, 175 F.Supp. 703.

SUMMARY: For five successive years, ending June 30, 1957, a Negro woman school teacher had received from the West Virginia State Superintendent of Schools a one-year "emergency"

teaching certificate to teach in a certain two-teacher school upon recommendation of her county school superintendent. Since an emergency certificate teacher is expected to have completed qualifications for a "first class" certificate within five years, she was not granted a sixth emergency certificate for the 1957-58 school term. Due to her lack of certification and to decreased pupil enrollment at her school, the county board of education did not employ her for the 1957-58 term, but retained the other teacher, who had a first-class certificate. On September 26, 1957, she received a first-class certificate but did not apply for teaching again until August, 1958, whereupon the superintendent promptly recommended her to the board, which employed her again. She brought a class action for injunctive relief and damages in federal court against the county superintendent and board, contending, *inter alia*, that defendants were contractually bound to employ her during 1957-58; that failure to do so constituted racial discrimination against her; and that there was a pattern not to employ her and five other teachers because of their race. The court concluded that the plaintiff had no right, contractual or otherwise, to demand a sixth emergency certificate and that defendants had tried "to aid her in every way" and had discriminated neither against her nor persons similarly situated after effectuation of integration in 1956.

WATKINS, District Judge.

Anna Starling, a Negro school teacher, has brought this action in behalf of herself and others similarly situated against the Board of Education and Superintendent of Schools of Mingo County, West Virginia. The case was tried without a jury upon the following issues: (1) Was the Board of Education contractually bound to employ plaintiff as a teacher for the school year 1957-58?, and (2) Did the Board's failure to hire plaintiff for that year constitute an act of discrimination against plaintiff because of her race? Plaintiff seeks an injunction against further discrimination, and damages. Both issues must be answered in the negative and the relief asked by plaintiff is denied.

[Valid Certificate Required]

Under the laws of the State of West Virginia, a person must hold a valid teaching certificate to receive compensation. W.Va.Code C. 18, art. 7, § 15 (Michie, 1959 Supp.). There are various types of certificates, and of these, two are pertinent to the present case. The first of these is the Professional Certificate which, prior to 1957, was called a First Class Certificate. For present purposes, the terms may be used interchangeably. This certificate is valid for five years, and is subject to renewal. The second pertinent certificate is the Emergency Certificate; it is issued by the State Superintendent of Schools on the recommendation of the County Superintendent for a period of one year, and is not subject to renewal. It is valid only for a particular school, and is issued as an emergency measure, to keep

schools open where there is a shortage of qualified teachers holding the Professional Certificate.

Having no First Class Elementary Certificate, in order for plaintiff to teach at the elementary level, it was necessary that she hold an Emergency Certificate. Superintendent Floyd, one of the defendants herein, had recommended plaintiff for such an Emergency Certificate for five years, the latest certificate expiring June 30, 1957. The purpose of the one-year Emergency Certificate was to take care of an emergency, and to permit the school teacher to go to summer school and qualify for a First Class Certificate. Obviously, the Board could not issue successive yearly Emergency Certificates to a school teacher indefinitely, otherwise few teachers would ever complete the requirements for a First Class Certificate. It was the policy of the defendants to refuse to recommend issuance of Emergency Certificates after five years. Since plaintiff had been issued Emergency Certificates for five successive years, when the Board met in May, 1957, to select the teachers for the school year beginning September 3, 1957, they did not employ plaintiff because the Superintendent, in accordance with the policy of the Board, would not recommend her for another Emergency Certificate. Twenty other teachers (all white) were cut off by the Board at the same meeting for the same reason.

[Continuing Contract of Employment]

Plaintiff relies upon a written contract signed June 4, 1956, with the Board entitled "Teacher's Continuing Contract of Employment." Clause (p) of that Contract provides: "This contract

shall terminate if at the beginning of any school term the Teacher does not hold a valid teacher's certificate covering the period of such term; * * *. Other provisos follow which are inapplicable here, inasmuch as they relate to renewal certificates, and the Emergency Certificate held by plaintiff during the 1956-57 school term was not renewable. Plaintiff had been hired for the year 1956-57 school term only, and by West Virginia law could not then have been hired for any successive school term, and nowhere in the record does she make any such claim. She does not deny that the Emergency Certificate under which she taught for that year expired at the end thereof. The validity of the Emergency Certificate by its own terms did not extend beyond July 1, 1957. As a practical matter its validity ended with the close of the 1956-57 school term on or about May 20, 1957. By her own admission she held only an emergency teaching permit during the 1956-57 school term, and she could not teach the following year without further certification. The so-called "Continuing Contract" was in force only so long as she was validly certified, and ceased to bind the Board in any manner upon the termination of the valid period of her Emergency Certificate. Plaintiff admits that when school started on September 3, 1957, she did not have a valid certificate of any type, either temporary or permanent. For a time prior to 1957 plaintiff held a First Class Certificate valid only for Home Economics through the ninth grade. Plaintiff had never taught a subject in Mingo County under that certificate inasmuch as there was no position in the entire school system which could be taught by one holding that particular certificate, and plaintiff does not here claim that that certificate has any effect in this action. Since plaintiff did not have any kind of an elementary teacher's certificate when school started on September 3, 1957, the Board was prohibited by State statute from employing her. W.Va.Code, 18-7-15. It was not until September 26, 1957, that plaintiff qualified and had a First Class Elementary Certificate issued to her. After receiving such certificate, plaintiff made no application for a teaching position for the 1957-58 school term or any part of it. Under date of August 3, 1958, after this action was instituted, plaintiff made written application for a teaching position for the coming year 1958-59. Having qualified, she was promptly recommended by the Superintendent, and on August 6 was offered her choice of five schools. Three of the teaching

positions were in schools the enrollment of which was made up entirely of white students. Plaintiff chose a school with all colored enrollment, entered into a new contract with the Board on August 6, 1958, and has taught in the Mingo County Schools since that date.

[Certificate Procurement Responsibility]

The procurement of a teacher's certificate was plaintiff's responsibility. Her contract ended because of her failure to become regularly certified. Plaintiff had no right whatsoever, either contractual or otherwise, to demand or receive a sixth Emergency Certificate, and no employment tenure or other rights became vested in her by virtue of the issuance or reissuance of previous Emergency Certificates. It was the duty of the Superintendent and the Board to secure teachers with the best possible professional qualifications and to discourage teachers from undertaking to teach year after year under Emergency Certificates.

Insofar as racial discrimination is concerned, the evidence shows that instead of discriminating against this plaintiff, the defendants and, in particular, Superintendent Floyd had endeavored to aid her in every way. This is shown by the issuance to her of five Emergency Certificates as a matter of grace, not right, and the waiving of a practice teaching requirement without which waiver she could not have received her First Class Certificate in September of 1957. Superintendent Floyd consulted with the State Board of Education on different occasions in her behalf in her effort to become regularly certified.

The evidence shows that there was another reason why plaintiff was not employed for the year 1957-58. In February, 1957, there had been a flood of Tug River and the Gates school, where plaintiff had taught, had suffered a very substantial decrease in pupil enrollment due to the movement away from the area of many families, and due to the fact that several colored pupils had elected to go to another school where white children were in attendance, such that the teacher-pupil numerical ratio no longer warranted or permitted the employment of two teachers at the Gates school. Since the other teacher held a First Class Certificate, she was retained and the position held by plaintiff ceased to exist.

[Integration Since 1956]

Prior to 1956, segregated schools were maintained in Mingo County. In March of 1956, the

Board unanimously adopted a resolution recognizing that segregated schools were no longer lawful, and that the county schools should thenceforth be operated on an integrated basis. This resolution was effectuated for the 1956-57 school term, and no discrimination prior to that time is cogent to the present matter.

During the trial, plaintiff and five other Negro teachers testified. Of these, one was the plaintiff's husband, a teacher employed by defendants, and he had no personal quarrel with the defendants. The other four teachers had at one time or another been declined employment in the Mingo County School system. Of these, the testimony of one was to the effect that she had been well treated, and was not unfavorable to defendants. Two others were qualified only in fields for which there were no openings in Mingo County, and the fourth was employed as a substitute teacher for the 1956-57 school term, taught elsewhere in 1957-58, and was employed on a full-time basis in Mingo County in 1958-59. None of these latter four contended that any racial discrimination had been shown them by defendants since the policy of integration was adopted.

The defendants have not discriminated against plaintiff or persons similarly situated on account of their race since the Mingo County schools became integrated. The contract designated "Teacher's Continuing Contract of Employment" terminated because, at the beginning of the school term 1957-58, plaintiff did not hold a

valid teaching contract as required by the terms of the contract.

[Statutes Validity Is Moot]

Plaintiff further asks that the following provisions of the laws of West Virginia be declared unconstitutional: Article XII, Section 8, Constitution of West Virginia, which reads "White and colored persons shall not be taught in the same school," and West Virginia Code Chapter 18, Article 5, Section 14, which implements the constitutional provision. Since defendants do not contend that these provisions offer a defense to them, and, in fact, admit that the provisions are no longer given effect by them, the constitutionality of the statutes is moot insofar as this case is concerned, and a ruling is not deemed necessary by this Court.

Other points raised by plaintiff were: (1) that the First Class Elementary Certificate issued to plaintiff under date of September 26, 1957, was retroactive to July 1, 1957; (2) that there was a pattern "not to employ them because they are Negroes;" and (3) that the Board failed to put plaintiff on a preferred list at its meeting in May, 1957. These points are so unfounded that they do not merit further discussion.

An order may be presented effectuating the views expressed above, which are now adopted as the findings of fact and conclusions of law of the Court.

CIVIL RIGHTS

Conspiracy—Federal Statutes

Kelsey D. BARTLETT v. Dr. Joseph DUTY, Dr. J. M. Garland, Dr. James G. Bond, Dr. Miriam Bell, all of Toledo State Hospital, Dr. Charles Bohnengel, Dr. J. M. Kenyon.

United States Court of Appeals, Sixth Circuit, October 1, 1959, 271 F.2d 284.

SUMMARY: An Ohio resident brought an action in federal district court against six Ohio physicians, charging them with conspiracy in causing him to be falsely arrested and maliciously prosecuted in a state probate court, whereby he was detained in a state mental institution for six days under a probate court detention warrant. Claiming his constitutional rights were violated, plaintiff brought action under the federal Civil Rights Act, seeking damages and an injunction ordering defendants to cease all interest in his mental health and restraining them from instituting any other similar action against him. The complaint was dismissed as to three defendants who were staff members of the institution because the broad conspiracy

allegation, in failing to reveal operative facts showing how they had deprived plaintiff of rights, was virtually only a conclusion of law, and these defendants had acted properly in their official capacities in not questioning the propriety of a valid court order. The complaint was also dismissed against two private doctors who had been appointed medical witnesses by the probate court to examine the plaintiff, because they were only carrying out a duty imposed by state law under a court order behind which they should not be required to look, and because as an arm of the court, they are entitled to enjoy the court's immunity from a claim under the Civil Rights Act even though the probate judge reached a conclusion upon all the evidence different from theirs. The complaint against the sixth doctor, who signed the affidavit filed in the probate court for admission of plaintiff, was also dismissed, there being no evidence to prove that he or anyone else had discriminated against or deprived plaintiff of equal protection or due process. Merely alleging a violation of constitutional rights does not confer federal jurisdiction in the absence of diversity of citizenship, the court stated, holding also that there was no basis upon which it could enjoin Ohio citizens from exercising rights granted under state laws enacted for the protection of the public and persons thought to be mentally ill. [See also, *Bartlett v. Weimar*, 268 F.2d 860, 4 Race Rel. L. Rep. 903, *infra*, (7th Cir. 1959)]. On appeal, the Court of Appeals for the Sixth Circuit denied, without prejudice, a motion to proceed in forma pauperis because the supporting affidavit was insufficient in that it stated the nature of the litigation in general terms only and failed to set out the alleged errors by the trial judge or to show what merit there was in the appeal.

CIVIL RIGHTS

Conspiracy—Federal Statutes

George H. BRASIER v. CITY OF TULSA

United States Court of Appeals, Tenth circuit, June 23, 1959, 268 F.2d 553.

SUMMARY: An Oklahoma resident brought suit in a federal district court against the city of Tulsa, seeking compensatory and punitive damages for the alleged unlawful conversion of his automobile in furtherance of a conspiracy to violate his civil rights. The automobile had been seized and stored at a public garage by the police acting pursuant to a city ordinance which declared a vehicle with two or more traffic summonses unpaid and outstanding against it to be a public nuisance. A summary judgment for the defendant was entered, the existence of no material question of fact being apparent; and the Court of Appeals for the Tenth Circuit affirmed for lack of federal jurisdiction. The latter court held that the action would not lie because the city could not conspire with itself and the federal Civil Rights Acts had not been shown to be applicable.

PER CURIAM.

Appellant-plaintiff, a resident of Oklahoma, by complaint filed in the United States District Court for the Northern District of Oklahoma, asserts a right to compensatory and punitive damages against the City of Tulsa for the alleged unlawful conversion of his automobile.

The trial court favored the City with summary judgment after determining from the pleadings and discovery proceedings that no material question of fact existed. We affirm, being in accord that the undisputed facts in the present posture of the case reveal no basis for federal jurisdiction of the controversy.

On July 10, 1958, police officers of the City

of Tulsa acting under the purported authority of a city ordinance¹ caused appellant's automobile to be seized, towed in and stored at a public garage and have since held the vehicle subject to appellant's compliance with the affirmative requirements of the ordinance. This, appellant has steadfastly refused to do and the car has remained impounded. At the time of the seizure the car was not being used in then present violation of any traffic regulation but it is admitted that there were then outstanding against the car two summonses for unpaid overtime parking violations (meter) and one sum-

mons for illegal parking to which latter charge appellant had responded and had been found to be not guilty after trial. Appellant, placing natural but legally irrelevant emphasis upon the erroneous inclusion, in the background of his present difficulties, of a charge upon which he had been acquitted, *alleges a conspiracy upon the part of the City of Tulsa to violate his civil rights*. Manifestly such an action will not lie for the City of Tulsa cannot conspire with itself and the *Civil Rights Acts* 42 U.S.C.A. §§ 1983, 1985 are not shown to be applicable. *Bot-tone v. Lindsley*, 10 Cir., 170 F.2d 705.

1. "(b) No person, owner or operator shall park, drive or permit to be parked or permit to be driven any vehicle which has two or more traffic summonses against it, such summonses having been disregarded and unpaid. Any vehicle with two or more traffic summonses unpaid and outstanding against it is hereby declared a public nuisance and may be impounded by the Police Department and released only on proof of ownership and payment in full of the storage and tow-in charges and the posting of suitable bond, approved by the Judge of the Municipal Court as surety for the court appearance when such bond is required."

Whether or not appellant has been wronged can only be determined by an interpretation of the constitutionality of the cited ordinance. We express no present opinion upon that question for the issue was not presented by the pleadings to the trial court and appellant stated in open court that he was not attempting to question the validity of the ordinance in the instant action.

Affirmed.

CIVIL RIGHTS

Federal Question—Federal Statutes

Charles D. STUART v. Will WILSON, Attorney General of the State of Texas, Texas State Board of Medical Examiners, and Henry Wade, District Attorney of Dallas County, Texas.

United States District Court, Northern District, Texas, Dallas Division, July 25, 1959, No. 8084-Civil.

SUMMARY: A number of naturopaths filed a complaint under the federal Civil Rights Act in federal district court against the Texas attorney general, a district attorney, and the state medical examiners' board, challenging the constitutionality and seeking to enjoin the enforcement of the state Medical Practice Act. It was alleged that defendants were threatening under that Act to deprive plaintiffs of their right to pursue their lawful occupation. The action was dismissed for lack of a substantial federal question warranting exercise of jurisdiction, and for failure to allege facts entitling plaintiff to any relief in a civil suit.

CIVIL RIGHTS

Immunity—Federal Statutes

Kelsey D. BARTLETT v. Dr. Robert E. WEIMAR.

United States Court of Appeals, Seventh Circuit, July 1, 1959, 268 F.2d 860.

SUMMARY: An Ohio resident brought suit in a federal district court in Indiana against an Indiana doctor, who had been appointed pursuant to statute by an Ohio probate court to examine plaintiff as to his mental health and to report findings to that court. The complaint charged that the manner in which the examination was conducted and the nature of the findings made had deprived plaintiff of constitutional rights under the federal civil rights statute. The district court dismissed the complaint, and, on appeal, the Court of Appeals for the Seventh Circuit affirmed. It was held that defendant while acting as an appointed officer of the court was entitled to judicial immunity to an action under the Civil Rights Act. The court further pointed out that the right not to have private individuals (if defendant were to be so classified) swear falsely in a state court is not a right secured by the federal constitution. The contention that immunity could not be extended to defendant because the probate court had failed to comply with notice requirements was rejected, because a medical witness would not be required to ascertain whether a court has fully complied with procedural requirements. [See also, *Bartlett v. Duty*, 174 F.Supp. 94, 4 Race Rel. L. Rep. 900, *supra* (N.D. Ohio 1959)].

CIVIL RIGHTS

Immunity—Federal Statutes

Adolph G. HOFFMAN v. C. H. HALDEN, Dr. Donald E. Wair, Dr. G. F. Keller, and Dr. F. Sydney Hansen.

United States Court of Appeals, Ninth Circuit, May 28, 1959, 268 F.2d 280.

SUMMARY: An Oregon citizen brought a damage suit in a federal district court against county health officers, an examining physician and a state mental hospital superintendent, claiming a violation of rights under the federal constitution and civil rights statutes, growing out of his having been taken into custody and incarcerated in the hospital. The complaint alleged that defendants had conspired to deprive plaintiff of the equal protection of the laws and of the privileges and immunities secured by federal law, and to "defeat the due course and due process of law and justice" in Oregon, in violation of 42 U.S.C.A. § 1985(3), § 1983, and § 1985(2), respectively. It was also asserted that each defendant "did purposely and systematically discriminate against plaintiff and subjected him to treatment in the following particulars which were not privileged or compelled by law . . .," and that defendants acted "under color and pretense" of Oregon statutes and "in furtherance of the conspiracy." Various overt acts pursuant to the conspiracy were then alleged. The complaint was dismissed for failure to state a claim for relief. On appeal, the Court of Appeals for the Ninth Circuit held that, since it is possible for two or more persons to do what one can do singly, there can be a civil conspiracy to violate Section 1983, although the statute does not so specify. While recognizing that "general conclusionary allegations" unsupported by facts have been consistently rejected as insufficient to state a cause of action under the Civil Rights Act, the court held that allegations in the instant complaint of "conspiracy," "conspiring," "discriminatory intent," and "acting under color of state law or authority" were necessary and proper at the pleading stage where plaintiff should not have to plead his evidence. The overt acts al-

leged were held sufficient to show specific acts in violation of due process which could have caused plaintiff injury and which, if performed to further the conspiracy, would bind all defendants found to be conspirators. The court rejected the contention that state officials have a blanket immunity to liability under civil rights actions for all acts committed within the ostensible scope of their authority, as the granting of such immunity would amount practically to a judicial repeal of the statutes. Assuming that plaintiff was detained by the state hospital superintendent under a judicial commitment, the court held that the latter enjoyed the immunity of a jailor and was immune also because exercising his statutory discretionary function to release an inmate only when he deemed it proper—even though he may have had a conspiratorial motive. However, the court held that immunity should not be granted to officials who have wilfully disobeyed a court order, as the health officers were alleged to have done and as the examining official was alleged to have conspired with them to do. The judgment was affirmed, therefore, as to the hospital superintendent, but reversed as to the other defendants.

Before STEPHENS, Chief Judge, CHAMBERS, Circuit Judge, AND JAMES M. CARTER, District Judge.

JAMES M. CARTER, District Judge.

This appeal, in an action for violation of civil rights, presents three major questions:

(1) The sufficiency of the second amended complaint to state a cause of action;

(2) The right to immunity, if any, possessed by state executive officers, and

(3) The impact of the statute of limitations upon the alleged cause.

The defendants below, here appellees, moved to dismiss the second amended complaint of Hoffman on the grounds of, (1) failure to state a claim for relief, and (2) that the claim was barred by the statute of limitations of Oregon.¹

The trial court entered a judgment of dismissal based on the first ground, failure to state a claim for relief. This appeal followed within the time allowed.

The second amended complaint is set forth in the margin.² The case apparently grows out of the fact that Hoffman was taken into custody on January 10, 1952 as a mentally ill person and again taken into custody on August 5, 1952, and incarcerated until October 23, 1952, at the Oregon State Hospital for the mentally ill. There is reference to detention in Morningside Hospital but no other information about this hospital is pleaded.

I.

The District Court has jurisdiction of the Cause.

We inquire first as to the jurisdiction of the district court over the subject matter of the cause. The second amended complaint bases

1. Footnote 1 omitted.

2. Footnote 2 omitted.

jurisdiction on Title 28 U.S.C.A. §§ 1331 and 1343. It alleges the action arises under the U.S. Constitution, Art. I, Sec. 8; Art. IV, Sec. 4, and amendments XIII and XIV; Title 18 U.S.C.A. §§ 231,³ 241, 242; and Title 42 U.S.C.A. §§ 1981-1988.

Title 42 U.S.C.A. §§ 1981-1988 contains the Civil Rights Statutes which may be the basis of a civil cause of action. Title 18 U.S.C.A. §§ 241 and 242 are criminal sections pertaining to civil rights and provide only criminal sanctions. They are only of passing interest.

Title 28 U.S.C.A. § 1343 expressly grants jurisdiction to the district court in civil actions for violation of civil rights. § 1331 grants jurisdiction if the cause arises under the Constitution or laws of the United States and the prayer exceeds \$3,000.

There is considerable doubt and confusion in the application of the Civil Rights Statutes throughout the circuits. A panel of this court in *Agnew v. City of Compton*, 9 Cir., 1956, 239 F.2d 226, has painstakingly and ably analyzed various of the sections. To the extent that case is applicable, we therefore follow it.

We hold that the district court had jurisdiction of the cause, *Agnew v. City of Compton*, supra. This court has jurisdiction of the appeal.

II.

The Second Amended Complaint states a cause of action.

In considering the question as to whether the second amended complaint states a cause of action, we do so without reference to the application of the statute of limitations or the prob-

3. There is no Section 231 in Title 18 U.S.C.A.

lem of immunity of state executive officers. We hereafter consider these problems.

The second amended complaint purports to allege a conspiracy based on § 1985, subdivisions (2) and (3), Title 42 U.S.C.A., and also on § 1983 of the same title.⁴

After reviewing scores of cases, we are of the view that the effect and scope of the Civil Rights Statutes must be gauged by the reported cases after about 1939. In considering this problem we particularly rely on *Agnew v. City of Compton*, supra, and the decisions of the Supreme Court, though few in number, which have considered the Civil Rights Statutes since that date.

[Post 1939 Decisions]

Hague v. C.I.O., 1939, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, was an important case in giving life and content to the Civil Rights Act. An injunction under § 43, old Title 8 U.S.C.A. (now § 1983, Title 42, U.S.C.A.) was sustained against municipal officials who interfered with union meetings. Justice Stone concurring stated (307 U.S. at page 526, 59 S.Ct. at page 469):

4. Sec. 1983, Title 42 U.S.C.A.

"Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979."

Sec. 1985, Title 42 U.S.C.A.

"Conspiracy to interfere with civil rights—Preventing officer from performing duties. . . ."

"Obstructing justice; intimidating party, witness, or juror.

"(2) . . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"Depriving persons of rights or privileges

"(3) If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. § 1980."

"It will be observed that the cause of action, given by the section in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment * * ."

United States v. Classic, 1941, 313 U.S. 299, at page 326, 61 S.Ct. 1031, at page 1043, 85 L.Ed. 1368, defined "color of state law." "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."*

In *Snowden v. Hughes*, 1943, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, the court had before it an action for damages under old Title 8 U.S. Code, §§ 41, 43 and 47(3) (now §§ 1981, 1983 and 1985(3), Title 42 U.S. Code Annotated). The court said at page 7 of 321 U.S., at page 400, of 64 S.Ct., "There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes * * ." And at page 8 of 321 U.S., at page 401 of 64 S.Ct., "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an ele-

5. The impact of *United States v. Classic*, 1941, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, was significant. Although it was a case involving the criminal portions of the Civil Rights Act, viz. §§ 19 and 20 of the Criminal Code, then old Title 18 U.S.C.A. §§ 51 and 52 (now Title 18 U.S.C.A. §§ 241 and 242) we think it had an effect on civil cases. The case held that § 20 (now § 242, Title 18 U.S.C.A.) "authorizes the punishment of two different offenses. The one is willfully subjecting any inhabitant to the deprivation of rights secured by the Constitution; the other is willfully subjecting any inhabitant to different punishments on account of his color or race, then are prescribed for the punishment of citizens." (313 U.S. at page 327, 61 S.Ct. at page 1043).

Prior to *United States v. Classic* there had been a tendency in the courts to look upon the Civil Rights Act as intended only to apply to class legislation or acts discriminatory towards negroes. Thus the statement appears in *Mitchell v. Greenough*, 9 Cir., 1938, 100 F.2d 184, "The prohibition against 'denial of the equal protection of the law' was to prevent class legislation or action." (at page 187).

ment of intentional or purposeful discrimination * * *." [Emphasis supplied.]

[Purposed Discrimination Essential]

The teaching of the case is therefore that it must be alleged and proved that the purpose of the acts complained of was to discriminate between persons or classes of persons.⁶ *Agnew v. City of Compton*, supra, so states, 239 F.2d at page 231. Note in *Cobb v. City of Malden*, 1 Cir., 1953, 202 F.2d 701, 707, Chief Judge Magruder's concurring opinion stating the need for "this crucial state of mind on the part of the defendants," to-wit, a realization "that they were subjecting plaintiffs to harm by an unconstitutional impairment of the obligation of their contracts with the City." (at page 707).

It is interesting in this respect to compare *Screws v. United States*, 1945, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, a criminal case, where there was charged a violation of the then existing Title 18 U.S. Code, § 52, (now 18 U.S.C.A. § 242) and a conspiracy to violate the section under the general conspiracy section. The court pointed out that the Congress in 1909 had added the word "willfully" but that to constitute the offense, more than what would be the ordinary requirement of proof of specific intent was required. The court said at page 107 of 325 U.S., at page 1038 of 65 S.Ct.: "But in view of our construction of the word 'willfully' the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e. g. the right to be tried by a court rather than by ordeal. * * *."

[Specific Intent Required]

Thus, in two cases, one involving the criminal statute and one involving the civil statute, the court reached similar results which we can equate, namely that a specific intent to violate one's constitutional rights was required under the criminal statutes and conduct which was "purposefully discriminating," as to such rights was required under the civil statute.⁷

6. It will be noted that the decision did not consider old Title 8 U.S.C.A. § 47(2), now § 1985(2), Title 42 U.S.C.A. dealing with conspiracies to impede justice.
7. *Accord, Burt v. City of New York*, 2 Cir., 1946, 156 F.2d 791, where Judge L. Hand reaches a similar conclusion.

Passing to *Collins v. Hardyman*, 1951, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253, a civil action under old Title 8 U.S.C.A. § 47(3) (now § 1985(3) Title 42 U.S.C.A.) no officers of the State were made defendants and although the action did not purport to rely upon old Title 8, § 43, present § 1983, Title 42 U.S.C.A. which expressly required action under color of State authority, nevertheless the court in substance read the same requirement into § 47(3) (now § 1985(3) Title 42 U.S.C.A.). The court said at page 661 of 341 U.S., at page 941 of 71 S.Ct., " * * * it is clear that this statute does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of 'equal protection of the law,' or of 'equal privileges and immunities under the law.' ". The court points out that the acts complained of were private acts, without even an attempt to influence or interfere with the law. "Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so." The rights of plaintiffs "under the laws and to protection of the laws, remained untouched * * *". (341 U.S. at page 661, 71 S.Ct. at page 942). [Emphasis in opinion].

[Color of Law Necessary]

We think it is now clear that an action under any of the Civil Rights statutes must allege acts done under color of state law,⁸ even though § 1985, Title 42 U.S.C.A. does not expressly contain this requirement. It should be noted that § 1985, Title 42 U.S.C.A. sets forth various civil conspiracies with only two of which we are here concerned. Subd. (2) defines the conspiracy to impede justice with intent to deny a citizen the equal protection of the law and Subd. (3) de-

8. *Baldwin v. Morgan*, 5 Cir., 1958, 251 F.2d 780; *Davis v. Foreman*, 7 Cir., 1958, 251 F.2d 421, 422; *McShane v. Moldovan*, 6 Cir., 1949, 172 F.2d 1016; *Shematis v. Froemke*, 7 Cir., 1951, 189 F.2d 963, 964; *Picking v. Pennsylvania R. Co.*, 3 Cir., 1945, 151 F.2d 240; *Schatte v. International Alliance etc.*, 9 Cir., 1950, 182 F.2d 158, 166. See *Hardyman v. Collins*, D.C.S.D.Cal. 1948, 80 F.Supp. 501 and cases collected by Judge Yankwich. The case was reversed by the Ninth Circuit in 183 F.2d 308 which was in turn reversed by the Supreme Court, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253. Contra: *Miles v. Armstrong*, 7 Cir., 1953, 207 F.2d 284, at page 286 states there can be a conspiracy under § 1985 (3) by private persons without an allegation as to color of law.

lines the conspiracy to *deprive a person* or class of persons of the equal protection of the law or equal privileges and immunities under the law. The two conspiracies are not identical. The first, § 1985(2) is narrower in one respect by its limitation to "citizen," and its failure to refer to "privileges and immunities." It probably is broader than § 1985(3) in its statement of purpose "to impede" etc., the due course of justice. The last portion of § 1985(3) applies to both conspiracies in its reference to overt acts and liability of all conspirators.

Elements of a Cause of Action.

It thus appears that under § 1985(2), Title 42 U.S.C.A. the elements of a cause of action are (1) that defendants conspired; (2) that the purpose of the conspiracy was to impede or hinder, or obstruct or defeat the due course of justice in a state or territory; (3) with the purposeful intent to deny to a citizen the equal protection of the law (Snowden v. Hughes, *supra*), and (4) that the acts complained of were done under color of state law or authority (Collins v. Hardyman, *supra*); (5) (the requirement of § 1985(3), Title 42 U.S.C.A.) that by acts done in furtherance of the conspiracy the plaintiff was injured in his person or property or was deprived of having and exercising a right or privilege of a citizen of the United States.

Under § 1985(3), Title 42 U.S.C.A. the elements of a cause of action are (1) that defendants conspired, (2) that the purpose of the conspiracy was to deprive plaintiff of equal protection of the laws or equal privileges and immunities under the law, (3) a purposeful intent to discriminate (Snowden v. Hughes, *supra*), and (4) that defendants acted under color of State law or authority (Collins v. Hardyman, *supra*); (5) the requirement of § 1985(3) that by acts in furtherance of the conspiracy plaintiff was injured in his person or property or was deprived of having and exercising a right or privilege of a citizen of the United States.⁹

Can there be an action for civil conspiracy to violate § 1983, Title 42 U.S.C.A.?

There is no statutory provision that there can be a conspiracy to violate § 1983, Title 42

U.S.C.A. nor does the specific requirement as to overt acts in § 1985(3), Title 42 U.S.C.A. apply expressly to § 1983.

It should be axiomatic that what one person can do, two or more persons can do jointly or in concert. This is in reality all that a civil conspiracy is¹⁰—concerted action or a sort of civil partnership in the commission of the injury whereby one may act for his partner and both be bound.

We cannot find a case expressly, stating that there may be such a civil conspiracy based on § 1983, Title 42 U.S.C.A. but we think the cases cited in the margin lend support.¹¹

We conclude that there may be stated a civil cause of action of conspiracy based on § 1983, Title 42 U.S.C.A.¹² or a cause alleging that the defendants acting jointly or in concert damaged plaintiff pursuant to § 1983.

Agnew v. City of Compton, *supra*, holds that an action based on § 1983 is not limited to deprivation of due process, but extends also to denial of equal protection, citing Hague v. C.I.O., 307 U.S. 496, 526, 59 S.Ct. 954, 83 L.Ed. 1423. We agree.¹³

10. Prosser, Law of Torts, 2d Ed. (1955) pp. 234-235.

11. In Lewis v. Brautigam, 5 Cir., 1955, 227 F.2d 124, at pages 127-128, 55 A.L.R.2d 505, the court said:

"The defendants would have us treat the complaint as filed strictly under the statute providing against conspiracy to interfere with civil rights, 42 U.S.C.A. § 1985. . . ."

"We do not think, however, that we are required so to treat the complaint. It charges that the conspiracy was actually carried into effect. If, thereby, the plaintiff was deprived of any rights, privileges or immunities secured by the Constitution and laws, the gist of the action may be treated as one for the deprivation of such rights under the broader civil rights statute, 42 U.S.C.A. § 1983 (footnote 2, *supra*). See Watkins v. Oaklawn Jockey Club, 8 Cir., 183 F.2d 440, 441. . . ."

See: Valle v. Stengel, 3 Cir., 1949, 176 F.2d 697, "aiding and abetting" (at page 702); Picking v. Pennsylvania R. Co., 3 Cir., 1945, 151 F.2d 240, "adopting a conspiracy" (at page 247); Baldwin v. Morgan, 5 Cir., 1958, 251 F.2d 780, "acting together," "aiding and abetting" (at page 788); Fleming v. South Carolina Elec. & Gas Co., 4 Cir., 1955, 224 F.2d 752, 753.

12. Contra: Jennings v. Nester, 7 Cir., 1955, 217 F.2d 153, 154, relying on Mitchell v. Greenough, 9 Cir., 1938, 100 F.2d 184 referred to below, in note 13.

13. Mitchell v. Greenough, 9 Cir., 1938, 100 F.2d 184; rehearing denied 100 F.2d 1006, gives us some concern. In it the court said, at page 186:

"The federal statute relied upon (8 U.S.C.A. §§ 43, 47) was enacted in 1871 to enforce the rights granted by the Thirteenth and Fourteenth Amendments to the Constitution, U.S.C.A.Const. Amends. 13, 14. We set out in the margin the clauses of 8 U.S.C.A. § 47 deemed applicable by the plaintiff. The question is then whether or not a conspiracy to secure a conviction of a criminal offense in a court having jurisdiction thereof and of the defendant by

9. See Collins v. Hardyman, *supra*, 341 U.S. at pages 659-660, 71 S.Ct. 937, as to the difference between the purpose of the conspiracy and the content of the overt acts.

Thus a cause of action for conspiracy or joint action based on § 1983 is broader than either of the two conspiracies (§ 1985(2) and (3)) referred to above.

The elements of such a cause of action are, (1) that defendants conspired or acted jointly or in concert; (2) that defendants acted under color of state law or authority; (expressly set forth in

statute) (3) a discriminatory intent (Snowden v. Hughes, supra); (4) that defendants subjected plaintiff (citizen or noncitizen) to a deprivation of a right, privilege or immunity (due process, equal protection of the law or equal privileges and immunities); (5) that overt acts were done pursuant to the conspiracy which damaged plaintiff.¹⁴

"Conclusionary allegations."

It is true that general conclusionary allegations unsupported by facts have consistently been rejected as insufficient to constitute a cause of action under the Civil Rights Act, *Agnew v. City of Compton*, supra, 239 F.2d at page 231.

Various Circuits have rejected in civil rights cases, "the mere allegations of conspiracy, fraud or malice;" and disregarded "... as mere conclusions, the loose and general, the factually unsupported, characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights ...".¹⁵ *Agnew v. City of Compton*, supra, 239 F.2d at page 231 refers in footnote 11 to "opprobrious conclusions ... 'spiteful, malicious, wrongful, oppressive ...' as adding nothing and correctly cites *Snowden v. Hughes*, supra, 321 U.S. at page 10, 64 S.Ct. at page 402. It will be noted however, that in *Agnew* and *Snowden*, supra, the court does not include the words "conspiracy" or "conspiratorial."

As quoted above from the second amended complaint, Hoffman set forth the purpose of the conspiracy as one "to deprive plaintiff of the equal protection of the laws and of those rights provided under the constitution and laws of the

knowingly using perjured testimony to convict an innocent person, is a conspiracy for the purpose of impeding the due course of justice in an attempt to deny to any citizen the equal protection of the laws." It is only in case of a conspiracy to effectuate such a purpose that one damaged in his person or property, or deprived of his rights as a citizen of the United States, is entitled to maintain an action for damages in the federal courts under the statute. (8 U.S.C.A. § 47, supra). No such purpose was involved in the alleged conspiracy in the case at bar. Appellant was subjected to no greater hazard than any other individual in the state, namely, the hazard of being prosecuted for a crime and convicted by false testimony, and if the prosecuting officer of the county were sufficiently corrupt to use his high office for the purpose of convicting innocent people by perjured testimony, all the citizens within his jurisdiction would be subject to the same hazard.

"It is clear that conspiracy to deny the defendant due process of law is not a conspiracy to deny a person 'equal protection of the law,' within the meaning of that phrase as used in the Fourteenth Amendment, U.S.C.A. Const. Amend. 14, and the act under consideration (8 U.S.C.A. § 47, supra). The two propositions are quite distinct. *Tinsley v. Anderson*, 171 U.S. 101, 106, 18 S.Ct. 805, 43 L.Ed. 91. The prohibition against 'denial of the equal protection of the law' was to prevent class legislation or action. It follows that the plaintiff has failed to state a cause of action within the terms of the federal statute (8 U.S.C.A. § 47, supra) upon which he relies."

The case in several places refers to the fact that the plaintiff relied upon 8 U.S.C.A. §§ 43 and 47. However, the decision set forth above would seem to rest on 8 U.S.C.A. § 47 only.

The case has been cited by various other circuits. In *Jennings v. Nester*, 7 Cir., 1954, 217 F.2d 153, the case is cited for the proposition "Section 1983 does not mention conspiracy, while Section 1985 does. Therefore the Act creates a cause of action for a conspiracy to deny equal protection but not for a conspiracy to deny due process." (at page 154). *Eaton v. Bibb*, 7 Cir., 1954, 217 F.2d 446 again cites it apparently for a similar proposition. *Laughlin v. Rosenman*, 1947, 82 U.S.App.D.C. 164, 163 F.2d 838, likewise cites it as a basis for sustaining the dismissal of the second count. In that case, which was based upon 8 U.S.C.A. §§ 43 and 47, the D.C. Circuit did not attempt to summarize what the case stood for, but quoted the portion of it we have quoted herein. Though cited in other circuits for a variety of propositions the case has only been cited on three occasions by the Ninth Circuit.

Judge Orr in *Schatte v. International Alliance etc.*, 9 Cir., 1950, 182 F.2d 158, at page 166, cites *Mitchell v. Greenough* (supra) with "CF".

"The civil remedies provided by the Civil Rights Acts are not a means of obtaining redress from er-

rors in official proceedings and decisions which are untainted by conspiracy or fraud. *CF Bottone v. Lindsley*, 10 Cir., 1948, 170 F.2d 705; *Mitchell v. Greenough*, 9 Cir., 1938, 100 F.2d 184."

In *Dinneen v. Williams*, 9 Cir., 1955, 219 F.2d 428, Judge Fee correctly cites the case for the principle that where there is a substantial claim of federal rights, jurisdiction is not defeated by failure of the plaintiff to state a cause of action.

Judge Lemmon in *In re Sawyer*, 9 Cir., 1958, 256 F.2d 553, cites the case in his dissent (at page 554) for the rule that the right to practice law is not a federally secured right.

14. This is true even though the latter portion of Sec. 1985(3) does not specifically apply to Sec. 1983. We discuss later the need and function of the overt acts.

15. *McGuire v. Todd*, 5 Cir., 1952, 198 F. 2d 60, at page 63; *Yglesias v. Gulfstream Park Racing Ass'n*, 5 Cir., 201 F.2d 817, at page 818; *Ortega v. Ragen*, 7 Cir., 1954, 216 F.2d 581, at page 563. See *Dunn v. Gazzola*, 1 Cir., 1954, 216 F.2d 709, 711.

United States;" and "to impede, hinder, obstruct and defeat the due course and due process of law and justice" in Oregon; and "to deprive plaintiff of the privileges and immunities secured by the constitution and laws of the United States." As to each defendant, it is alleged he "did purposely and systematically and intentionally discriminate against plaintiff and subjected him to treatment in the following particulars which were not privileged or compelled by law"

Clearly the plaintiff is alleging the "purposeful discrimination" required under the cases, *Snowden v. Hughes*, supra, 321 U.S. at pages 7, 8, 10, 64 S.Ct. at pages 400, 401, 402; *Agnew v. City of Compton*, supra, 239 F.2d at page 233.

[Unnecessary to Plead Evidence]

Hoffman also alleges the "defendants conspired." In what other way can plaintiff plead conspiracy? Certainly he is not required to list the place and date of defendants' meetings and the summary of their conversations. He should not be required here to plead his evidence.

Hoffman also alleges defendants acted "under color and pretense" of the statutes and laws of Oregon and that the acts complained of "were not committed in their individual capacities." The enumeration of acts complained of as to each defendant alleges that the acts were "in furtherance of the conspiracy" and under "color and pretense of the statute"

We are aware of the experiences of the trial judges that an astonishing few of the actions for violations of civil rights have any real merit when explored and tried on the merits and we sympathize with the desire of the trial judges to expediently dispose of these cases. We question some of the broad language used in the decisions concerning "conclusionary allegations." We think the validity of the complaint at the pleading stage cannot be disposed of on the basis of the presence of so-called "conclusionary" allegations of "conspiracy" or "conspiring," of "discriminatory intent" or of "acting under color of state law or authority" but that as to these elements of a cause of action such allegations are proper and necessary. However, attention should be directed to the nature of the overt acts alleged¹⁶ to determine if a cause of action is stated. This thesis we now explore.

16. This was Judge Hamley's approach in *Agnew v. City of Compton*, supra.

The Function of Overt Acts in a civil conspiracy case.

In a criminal conspiracy, the conspiracy is the gist of the crime¹⁷ and the function of the overt act is to show that the agreeing or conspiring has progressed from the field of thought and talk into action. It completes the offense.¹⁸

In a civil conspiracy, the conspiracy itself is not a cause of action, without overt acts, because again it is the overt act which moves the conspiracy from the area of thought and conversation into action and causes the civil injury and resulting damage. Accordingly, the cases hold that the damage in a civil conspiracy flows from the overt acts and not from the conspiracy.¹⁹

Therefore, the certainty we look for in a proper complaint under the Civil Rights Statutes, is not in the general allegations of conspiracy, purpose, intent and color of authority but the certainty and substance in the particular acts which are alleged to have caused damage. The real question is whether or not the second amended complaint, in addition to the general allegations referred to above, sets forth with certainty facts showing particularly what a defendant or defendants did to carry the conspiracy into effect, whether such acts fit within the framework of the conspiracy alleged, and whether such acts, in the ordinary course of events, would proximately cause injury to the plaintiff.

If sufficient allegations appear of the acts of one defendant among the conspirators, causing damage to plaintiff, and the act of the particular defendant was done pursuant to the conspiracy, during its course, in furtherance of the objects of the conspiracy, with the requisite purpose and intent and under color of state law, then all defendants are liable for the acts of the particular

17. *United States v. Falcone*, 1940, 311 U.S. 205, 210, 61 S.Ct. 204, 85 L.Ed. 128; *Black v. United States*, 9 Cir., 1958, 252 F.2d 93, 94; *Toliver v. United States*, 9 Cir., 1955, 224 F.2d 742, 744.

18. *Fiswick v. United States*, 1946, 329 U.S. 211, 216, 67 S.Ct. 224, 91 L.Ed. 196; *Hudspeth v. McDonald*, 10 Cir., 1941, 120 F.2d 962, 965; certiorari denied 314 U.S. 617, 62 S.Ct. 110, 86 L. Ed. 496, rehearing denied 325 U.S. 892, 65 S.Ct. 1181, 89 L.Ed. 2004.

19. *Collins v. Hardyman*, 1951, supra, 341 U.S. 651, 659, 71 S.Ct. 937, 95 L.Ed. 1253; *Agnew v. City of Compton*, 9 Cir., 1957, 239 F.2d 226, 232; *Suckow Borax Mines Consol. v. Borax Consol. Ltd.*, 9 Cir., 1950, 185 F.2d 196, 208; *Orloff v. Metropolitan Trust Co.*, 1941, 17 Cal.2d 484, 110 P.2d 396; *Prosser, Law of Torts*, 2d Ed. (1955) p. 235, and cases cited in note 39.

defendant under the general principle of agency on which conspiracy is based.²⁰

Proximate causation.

There are various cases which point out that certain acts preliminary to judicial decision or action can not be the basis for a claim under the Civil Rights statutes. These cases are essentially cases on proximate causation. *Whittington v. Johnston*, 5 Cir., 1953, 201 F.2d 810, certiorari denied 346 U.S. 867, 74 S.Ct. 103, 98 L.Ed. 377, often cited, states at page 811:

"It is a non sequitur to say that merely by instituting the lunacy proceeding, the defendants 'caused' plaintiff to be deprived of her right to due process within the meaning of 8 U.S.C.A. § 43. If there was any denial of due process, the efficient cause thereof was the omission of the state probate judge to give notice of the proceeding. That failure is not attributable to these defendants. Whether or not notice should be given is committed by the Alabama statute to the discretion of the probate judge. These defendants had no duty in that behalf. They simply instituted the lunacy proceeding as the Alabama statute authorized them to do, and left the conduct thereof wholly to the discretion of the probate judge whose duty and function it was to give any necessary notice."²¹

20. *Hitchman Coal & Coke Co. v. Mitchell*, 1917, 245 U.S. 229, 249, 38 S.Ct. 65, 62 L.Ed. 260; *United States v. Olweiss*, 2 Cir., 1943, 138 F.2d 798, 799-800, certiorari denied 321 U.S. 744, 64 S.Ct. 483, 88 L.Ed. 1047.

21. *Kenny v. Hatfield*, D.C.W.D.Mich.1955, 132 F.Supp. 814, was an action under the Civil Rights statute. Robinson, one of the defendants, prepared the petition which was the first step in the proceedings which resulted in plaintiff's commitment to the State hospital. The court quoted from *Whittington v. Johnston*, supra, and held that no cause of action was stated against the defendant Robinson.

On appeal the case was affirmed (6 Cir., 1956) sub nom. *Kenney v. Fox*, 232 F.2d 288. The court at page 290 stated that "Robinson, a private practitioner, in preparing the papers filed as the first step in the proceedings resulting in Kenney's commitment . . . was not amenable to an action based on the civil rights statute."

In *Culksa v. City of Mansfield*, 6 Cir., 1957, 250 F.2d 700, at page 704, the court held, "The actions of the constable in initiating the prosecution and in testifying did not deprive the appellant of any constitutional right. Nor is he responsible for the subsequent actions and rulings of the judge," citing *Whittington v. Johnston* (supra).

In *Dunn v. Gazzola*, 1 Cir., 1954, 216 F. 2d 709, Gazzola served plaintiff with a notification to ap-

pear and Marron served her with a complaint. The court said these actions "subjected the plaintiff to trial, but not to an 'unfair' trial. The control of the trial was exclusively within the province of the court . . . other allegations against the officers with regard to their failure to give proper notice of trial or to advise the plaintiff of her right to counsel are even more frivolous; the court, not the arresting officer, has the duty to give an accused whatever notice and whatever advice are required." (at page 711).

22. Compare the rule concerning intrinsic and extrinsic fraud, *Pico v. Cohn*, 1891, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336.

Sufficiency of the overt acts.

The laws of Oregon of which we take judicial notice, provide for a Board of Health for each

city. . . . Thus, where the wrongful acts preceding the court order, like intrinsic fraud, were subject to being exposed and reviewed in the court hearing, relief thereafter based on them might not be granted; that where the wrongful acts were such as come by analogy within the rule of extrinsic fraud, and where there would be no chance or opportunity to learn of or to expose the wrongful acts at the hearing, then the acts might well be the proximate cause of the injury.

city and county of the state, O.C.L.A. 99-201; and that each Board shall select as secretary a person licensed by the State Board of Medical Examiners who shall be the Health Officer, O.C.L.A. 99-201. Former O.C.L.A. 99-201, now O.R.S. 431.440, provides that "all county and city health officers shall possess the powers of constables or other peace officers in all matters pertaining to the public health."

Chapter 571 of the Oregon Laws of 1949 (now codified in O.R.S. 426.110-426.130) relates to apprehension, examination and commitment of mentally ill persons. Sec. 3 provides for the appointment by a Judge of two physicians, or one physician in counties having a population of 10,000 or less, who may be the county health officer. Sec. 4 provides the procedure for the appointed physicians to examine and report on the condition of persons alleged to be mentally ill. The county judge is given authority to "examine the reports, findings and evidence and when in his opinion" such person is in need of treatment, care or custody "*he shall adjudge the person to be mentally ill and order him committed to the proper state hospital* * * *". [Emphasis supplied.]

Sec. 127-202, O.C.L.A. provides "The Eastern Oregon state hospital, situate in the city of Pendleton * * * shall be used as an asylum for such mentally diseased persons as have been or may hereafter be committed to its care and custody." It is alleged defendant and respondent Wair is superintendent of this hospital and restrained Hoffman from leaving it.

Sec. 127-202, O.C.L.A. further provides "The superintendent shall from time to time, discharge such patients as, in his opinion, are properly fit to be discharged."

Sec. 127-216, O.C.L.A. provides "The superintendent of any state hospital wherein are confined persons adjudged to be insane, may * * * discharge any patient, except one held upon an order of a court or judge having criminal jurisdiction in an action or proceeding arising out of a criminal offense, at any time * * *".

[Overt Acts Alleged]

Paragraph VIII of the second amended complaint contains 18 overt acts allegedly done by Hansen, the County Health Officer and Halden, Deputy County Health Officer. Paragraph IX sets forth 11 overt acts allegedly done by Keller, the examining physician and Paragraph X sets

forth 5 overt acts allegedly done by Wair, the superintendent of the State hospital. We are not required to examine them all, if one or more show injury to the plaintiff pursuant to the conspiracy alleged.

In Paragraph VIII overt act No. 9, it is alleged that Halden and Hansen wilfully failed to act in good faith and pursuant to the mandate of State law, in that in wilful violation of an order of the Circuit court of Multnomah county, Oregon issued on or about August 4, 1952, which required that plaintiff be brought before that court, the defendants instead forcibly took plaintiff to a place of detention. Overt act No. 10 alleges the wilful refusal of Halden and Hansen to advise the Circuit court that they had ignored the order and were detaining plaintiff against his wishes. Overt act No. 11 alleges a false return of citation, which citation purportedly stated that Halden and Hansen had followed the order of the Circuit court referred to above. Overt act No. 12 alleges an intentional suppression of the facts regarding plaintiff's illegal detention from the proper authorities.

Paragraph IX in overt act No. 16, alleges as to Keller,—"suppressing the facts regarding plaintiff's illegal detention from the proper authorities * * *". We assume this is the same detention referred to in overt acts Nos. 9, 10 and 11 alleged as to Halden and Hansen. Overt act No. 11 alleges Keller knew of the disobedience of Hansen and Keller to the court order and that he refused to direct them to deliver plaintiff to the court rather than the Morningside hospital. Whether he had authority to so direct is not shown, but having been appointed by the court, he may have had some duty in connection with observing orders of the court when he was apprised of them.

[Requirements of Overtness Met]

These facts, which we must presume to be true at the pleading stage, show specific acts in violation of due process of law which could have caused the plaintiff injury through the imprisonment which resulted, and if found to have been performed in furtherance of the conspiracy would bind all defendants found to be members of the conspiracy.

But Keller contends he is a private practitioner and was not acting under color of law. The complaint alleges that Keller was a licensed and practicing physician within the state of Oregon, and

that he had been specially ordered by the circuit judge of Multnomah county, Oregon, to make an adequate mental and psychological examination of the plaintiff. Hoffman contends Keller had been hired by the state to perform a duty and therefore was acting for the state. We do not think we are required to determine whether or not Keller, individually, was acting under color of state law.

The law is clear that when two or more persons conspire to violate the civil rights of an individual, acting under color of state law, if one or more of the conspirators is a state officer, then the mere fact that certain of the other conspirators are not state officers constitutes no defense to any of them under the Civil Rights statutes.²³ Clearly, Halden, Hansen and Wair were state officers. Whether or not Keller was acting under color of state law, in view of the conspiracy allegations, becomes immaterial.

Passing momentarily the questions of immunity and statutes of limitations we conclude that at least as to the overt acts specifically referred to above, the second amended complaint states a cause of action against all respondents.

III.

Immunity.

Appellees Wair, Halden and Hansen also support the dismissal of the second amended complaint on the claim of their immunity, as state officials, from civil prosecution.

In *Tenney v. Brandhove*, 1951, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019, the Supreme Court held that the Civil Rights Act had not abolished the common law privilege of a legislator to be free from civil liability for acts done by him in the field where legislators traditionally have power to act.

Immunity has been extended to judges in civil actions against them, even for acts in excess of their jurisdiction, so long as they had any jurisdiction whatsoever.²⁴ Immunity from civil lia-

bility has also been extended to prosecuting attorneys.²⁵

The immunity problem does not arise solely in Civil Rights cases. There are cases, often cited for the immunity principle, which are in reality only cases where the officer performed the duty imposed upon him by law and hence was not liable for damages for his acts; his motive was immaterial, *Spalding v. Vilas*, 1896, 161 U.S. 483, 499, 16 S.Ct. 631, 40 L.Ed. 780. This rule makes sense in the cases not brought under the Civil Rights Act.

But the broad scope of the Civil Rights Act would impose liability on state officers for acts done under color of law,—acts done within, as well as without, the scope of their authority.

Thus it is not enough for such a defendant in a Civil Rights case, to say—"I acted under the law—I did what the law required." True, under *Snowden v. Hughes*, supra, there is required allegation and proof of a particular state of mind, a purposely discriminatory intent. See *Screws v. United States*, supra.

[State-Federal Relationships]

Since these Civil Rights actions lie in the federal courts and defendants are usually state officials, there are involved "delicate state-federal relationships," *Francis v. Lyman*, 1 Cir., 1954, 216 F.2d 583, 588.²⁶

172 F.2d 1016 and *Picking v. Pennsylvania R. Co.*, 3 Cir., 1945, 151 F.2d 240, 250. Both of these cases were decided before *Tenney v. Brandhove*, supra. An old case, *Ex parte Virginia*, 1880, 100 U.S. 339, 35 L.Ed. 676, holds a judge is not protected where he acted ministerially.

25. *Kenney v. Killian*, D.C.W.D.Mich. 1955, 133 F.Supp. 571, 578, 580, affirmed sub nom. *Kenney v. Fox*, 6 Cir., 1956, 232 F.2d 288, certiorari denied 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed.2d 66 sub nom. *Kenney v. Killian*; *Yaselli v. Goff*, 2 Cir., 1926, 12 F.2d 396, 56 A.L.R. 1239, affirmed per curiam 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 "on the authority of *Bradley v. Fisher*, 13 Wall. 335, 347, 20 L.Ed. 6; *Alzua v. Johnson*, 231 U.S. 106, 111, 34 S.Ct. 27, 58 L.Ed. 142;" *Cawley v. Warren*, 7 Cir., 1954, 216 F.2d 74, 76; *Laughlin v. Rosenman*, 1947, 82 U.S. App.D.C. 164, 163 F.2d 838; *Thompson v. Heithier*, 6 Cir., 1956, 235 F.2d 176.

See, *Lewis v. Brantigan*, 5 Cir., 1955, 227 F.2d 124, at pages 128, 129, 55 A.L.R.2d 505, as to immunity from liability for acts within the scope of jurisdiction and authority.

26. The problem has been often referred to:—In re Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835; *Douglas v. City of Jeannette*, 1943, 319 U.S. 157, 163, 63 S.Ct. 877, 87 L.Ed. 1324; *Screws v. United States*, supra, 325 U.S. at page 108, 65 S.Ct. 1031; *Collins v. Hardyman*, supra, 341 U.S. at page 658, 71 S.Ct. 937.

23. *Baldwin v. Morgan*, 5 Cir., 1958, 251 F.2d 780, 788; *Picking v. Pennsylvania R. Co.*, 3 Cir., 1945, 151 F.2d 240, 249; *Valle v. Stengel*, 3 Cir., 1949, 176 F.2d 697, 702.

24. *Bradley v. Fisher*, 1872, 13 Wall. 335, 80 U.S. 335, 352, 20 L.Ed. 646; *Alzua v. Johnson*, 231 U.S. 106, 34 S.Ct. 27, 58 L.Ed. 142; *Francis v. Crafts*, 1 Cir., 1953, 203 F.2d 809, 811, certiorari denied 346 U.S. 835, 74 S.Ct. 43, 98 L.Ed. 357; *Cuiksa v. City of Mansfield*, 6 Cir., 1957, 250 F.2d 700, 703, certiorari denied 356 U.S. 937, 78 S.Ct. 779, 2 L.Ed. 2d 813; *Ryan v. Scoggins*, 10 Cir., 1957, 245 F.2d 54.

Contra: *McShane v. Moldovan*, 6 Cir., 1949,

In *Stefanelli v. Minard*, 1951, 342 U.S. 117, at pages 121-125, 72 S.Ct. 118, at page 122, 96 L.Ed. 138, Justice Frankfurter after pointing out the "far-flung and undefined range" of questions of procedural due process under the Civil Rights Acts (342 U.S. at page 123, 72 S.Ct. at page 122) concludes with the enigmatic statement, "To suggest these difficulties is to recognize their solution." (342 U.S. at page 124, 72 S.Ct. at page 122).

To protect this "delicate state-federal relationship" some limits must be placed on the otherwise limitless sweep of the Civil Rights Act.

A broad holding that all state officials enjoyed immunity would be an improper approach. If courts held that all state officials had immunity from liability under Civil Rights actions for all acts done or committed within the ostensible scope of their authority, this would practically constitute a judicial repeal of the Civil Rights Act. Repeal is the responsibility of Congress, not the courts.

Immunity for Discretionary Acts.

The approach of granting immunity to government officials for discretionary acts done within the scope of their authority seems a proper one. Without the presence of a particular discriminatory intent they have no liability in any event. This approach says we will not inquire, subjectively—into their state of mind—where they are exercising a discretionary function.

Cooper v. O'Connor, 1938, 69 App.D.C. 100, 99 F.2d 135, 142, 118 A.L.R. 1440, was an action in the federal court against federal officers for allegedly procuring the indictment of plaintiff, "falsely, maliciously and without probable cause," at the trial of which plaintiff was acquitted. The court concluded that since the acts of the defendants "were performed in the discharge of their official duties, the motives with which those duties were performed are immaterial * * *". (At page 142). The case has been widely cited and followed for its holding that governmental officers are generally not liable for their discretionary acts done pursuant to their lawful authority.

A panel of this court in *O'Campo v. Hardisty*, 9 Cir., 1958, 262 F.2d 621, recently cited and followed *Cooper v. O'Connor*, supra. This case was originally a state action against Internal Revenue agents and was removed to the federal court. It was found the defendants were acting

solely under color of their respective offices and by authority of the Revenue laws. The defendants were in substance performing their duties. Hence they should not be civilly liable. The panel based its decision on the "immunity" doctrine. Though neither are Civil Rights cases, we are content to follow *O'Campo v. Hardisty*, supra and *Cooper v. O'Connor*, supra, in this case and extend immunity to a state officer for his discretionary acts within the scope of his authority.

Failure of jailors or keepers to release a prisoner—not a basis for liability.

We think the failure of a jailor or keeper to release a prisoner held on a warrant or commitment cannot be the basis for a civil rights action regardless of allegations of malice, motive or intent. His act is required by law. Even if the statute were later held void or the conviction later set aside, so long as he acted under authority of the writ or warrant, he was performing a duty which the law at that time required him to perform.

In *Francis v. Lyman*, 1 Cir., 1954, 216 F.2d 583, at pages 588-589, Judge Magruder states: "The privilege of the jailor to impose the confinement * * * is, we think, quite as time honored in the Anglo-American common law as is the immunity of members of the legislature and of judges from civil liability for acts done within the sphere of their judicial activities," citing cases. [Emphasis supplied.]

In *Kenney v. Fox*, 6 Cir., 1956, 232 F.2d 288, at page 290, the court stated with reference to two doctors, " * * * the institutional doctors should not be expected or even permitted to go behind a court order of commitment of a person to a state mental hospital where, on its face, the order appears to be valid."

In *Dunn v. Gazzola*, 1 Cir., 1954, 216 F.2d 709, 710, where the plaintiff complained of failure to be released from custody, a dismissal as to Van Waters, superintendent of a reformatory and McDowell, Commissioner of Corrections, was affirmed on authority of *Francis v. Lyman*, supra.

We now apply the foregoing principles to the acts charged to the defendants. Obviously no immunity should be granted to the officials who willfully disobeyed an order of court. This disobedience affirmatively appears as to Halden and Hansen; and Keller is alleged to have conspired with them to have effected this object of the conspiracy.

Paragraph X in overt act Nos. 1 and 2, allege Wair restrained plaintiff from leaving the Oregon State Hospital despite the fact that Wair knew plaintiff was being illegally held and was not suffering from mental illness. Overt act No. 3 alleges Wair suppressed the facts of such illegal detention from the proper authorities. This detention of Hoffman at the Oregon State Hospital is alleged to have been from August 5, 1952 to October 23, 1952. No detention of Hoffman by Wair is alleged to have occurred at Morningside Hospital or elsewhere other than at the State Mental Hospital. Since Sec. 4 of Chap. 571 of the Oregon Laws of 1949 requires a judge to determine if a person is mentally ill and if so, order him committed to a state mental hospital, we assume Hoffman was at the State hospital under a judicial commitment.

Since Wair detained Hoffman under a judicial commitment he was individually performing a duty from which no liability would ensue. For such acts, he enjoyed the immunity of a jailor.

Wair, however, had authority to release Hoffman from the State Mental Hospital, when in Wair's opinion this was proper. Sec. 127-202, O.C.L.A.; Sec. 127-216, O.C.L.A. This was a discretionary function and under the authorities cited supra, Wair possessed immunity from civil actions in the exercise of this function.

[Was Immunity Lost?]

There remains a further troublesome question. Assuming Wair is immune for acts done while complying with an order for Hoffman's commitment, and acts done in the exercise of a discretionary function, does he lose that immunity by conspiracy with the other officials? The immunity of a labor union under the Antitrust laws is lost when it conspires with employers.²⁷ The immunity of cooperatives under Antitrust laws may be lost when they conspire with third persons.²⁸

We think our case rests on a different basis. If the official in complying with an order for a

plaintiff's commitment, and in performing his discretionary acts is immune regardless of his motive, then a conspiratorial motive or intent should not make him liable. By the same token, we do not think that any acts done by defendant Wair, which come within the immunity principle, can be used against the other defendants, alleged to have conspired with Wair, to prove damage to the plaintiff.

As to the remaining overt acts charged to Wair, overt act No. 4 alleges Wair's refusal to permit plaintiff to correspond or communicate with appropriate authorities, "except to a limited extent." If Hoffman could correspond at all, he could make known his complaint. In addition, the matter complained of could not have been the proximate cause of the injury.

Overt act No. 5 alleges Wair intimidated Hoffman "in an effort to force him to dismiss a civil action" which Hoffman had filed. There is no allegation that the action was ever dismissed and the alleged overt act could not have been the proximate cause of any injury.

IV.

Statute of Limitations.

The problem of the statute of limitations is very much in this case. It was raised as a ground for the motion to dismiss by each respondent. It was not ruled on by the trial court. Neither appellant nor respondents have adequately analyzed or briefed the problems pertaining to such issue. Some of these problems we here decide, others are returned to the trial court for consideration.

Specifically, Hoffman relies upon O.C.L.A. 1-204 (now O.R.S. 12.080) which provides, "Within six years. 1. * * * 2. an action upon a liability created by statute, other than a penalty or forfeiture, excepting those mentioned in section 1-207, as amended." The matters mentioned in Section 1-207 (now O.R.S. 12.120) are not pertinent.

The appellees rely upon a two year statute, O.C.L.A. 1-206 (now O.R.S. 12.110), "Within two years,—(1) an action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein especially enumerated; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of fraud or deceit * * *". [Emphasis supplied.]

27. *Bradley Co. v. Local Union No. 3 etc.*, 1945, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939.

28. *United States v. Maryland Coop. Milk Producers, D.Col.* 1956, 145 F.Supp. 151, 153-154; *United States v. Maryland & Virginia Milk Producers Ass'n, Inc.*, D.C. 1958, 167 F.Supp. 45; *Id.* 167 F.Supp. 799; *April v. National Cranberry Ass'n*, D.C.Mass. 1958, 168 F.Supp. 919; *United States v. Borden Co.*, 1939, 308 U.S. 188, 204, 60 S.Ct. 182, 84 L.Ed. 181; *United States v. Maryland & Virginia Milk Producers Ass'n*, 1949, 85 U.S.App. D.C. 180, 179 F.2d 426, 428.

Another statute providing limitation of three years is worthy of consideration and is included in the note.²⁹

(a) *When does the statute of limitations begin to run?*

There is reference in the briefs *but not in the record* to problems concerning the time of issuance of summons and service of process. We are bound by the record.

The filing of the complaint in the district court tolls the statute of limitations where the action is to enforce as here, a federally created right, *Bomar v. Keyes*, 2 Cir., 1947, 162 F.2d 136, 141. See, *Ragan v. Merchants Transfer & Warehouse Co.*, 1949, 337 U.S. 530, 533, 69 S.Ct. 1233, 93 L. Ed. 1520; cf. *Mohler v. Miller*, 6 Cir., 1956, 235 F.2d 153.

In civil conspiracy cases for treble damages under the Antitrust laws, the statute of limitations runs from the overt act alleged to have caused damage. *Burnham Chemical Co. v. Borax Consol. Ltd.*, 9 Cir., 1948, 170 F.2d 569, at pages 575 and 595; *Suckow Borax Mines Consol. v. Borax Consol. Ltd.*, 9 Cir., 185 F.2d 196, 208; *Momand v. Universal Film Exch. Inc.*, 1 Cir., 1948, 172 F.2d 37, at page 49; *Williamson v. Columbia Gas & Elec. Corp.*, 3 Cir., 1950, 186 F.2d 464, 469; *Steiner v. 20th Century-Fox Film Corp.*, 9 Cir., 1956, 232 F.2d 190 at page 194.

[*Rule Concerning Civil Rights*]

We see no reason why the same rule should not apply in civil conspiracy to violate the Civil Rights act and we so hold.

In ascertaining which is the last in time of the overt acts, we note several dates mentioned in the second amended complaint and from this complaint, the significance of these dates can be ascertained.³⁰

29. O.C.L.A. 1-205 (now O.R.S. 12.100) "Within three years: (1) An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office; or by the omission of an official duty; including the nonpayment of money collected upon an execution. But this section shall not apply to an action for an escape. (2) An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state, except where the statute imposing it prescribes a different limitation." O.C.L.A. 99-201 (now O.R.S. 431.440) provides that health officers possess the powers of constables.

30. The chronology of events is as follows:—

1/10/52 Plaintiff taken into custody.
8/ 5/52 Order of Circuit court (Trial court) of

(a) January 10, 1952:—Plaintiff was taken into custody;

(b) August 5, 1952:—Various acts of the defendants are alleged as having occurred on this date; property was seized from plaintiff's person on this date; the court order was issued from the circuit or trial court of Multnomah county, Oregon, requiring plaintiff to be brought before the court; plaintiff was delivered to the Morningside hospital rather than brought before the court;

(c) October 23, 1952:—Paragraph XI of the second amended complaint alleges confinement in the Oregon State Hospital at Pendleton, from August 5, 1952 to and including October 23, 1952;

(d) June 18, 1956:—Paragraphs VII, VIII, IX, X, in substance allege the conspiracy continued to June 18, 1956. No other information appears in the record nor is there any other allegation of fact as to what occurred on that date. In the briefs, appellant informs this court that on such date Hoffman was restored to sanity. This statement appearing in the briefs is not a matter in the record and therefore we have a bald allegation in the second amended complaint that the conspiracy continued to a certain date with no facts as to what is the significance of the date.

[*Overt Act Dates Significant*]

June 18, 1956, is therefore, by no stretch of the imagination, an allegation of an overt act, and even if the conspiracy did continue to such date, the date has no significance in our determination of the case, since injury and damage can only

Multnomah county that plaintiff be brought before the court.

10/23/52 Release of plaintiff from custody.

1/10/54 Original complaint filed by plaintiff against Dickson, Halden, Dammasch, Keller, John Doe and Richard Roe.

[The two names emphasized are those of two of the original defendants whose names appear in the second amended complaint, now before this court].

8/10/54 Original complaint dismissed for failure to prosecute.

6/18/56 Alleged date of termination of conspiracy.

11/ 1/56 Dismissal vacated and set aside.

12/18/56 Amended complaint filed; caption not in record; body of complaint names Halden, Hansen, Wair and Keller, (only Halden and Keller named in original complaint);

1/21/57 Amended complaint dismissed as to Hansen and Halden; 15 days to amend.

3/1/57 Amended complaint dismissed as to Wair, with leave to amend;

3/4/57 Second amended complaint filed, Halden, Hansen, Keller and Wair named as defendants.

10/14/57 Judgment dismissing Second amended complaint as to all defendants, (Halden, Hansen, Keller and Wair).

flow from overt acts and not from the mere continuance of a conspiracy. We therefore ignore the date of June 18, 1956. Since October 23, 1952, is the last overt act alleged from which damage could have flowed, this date becomes the last date from which a statute of limitations might run.

(b) *Sanity or competence of the plaintiff.*

Hoffman cites in his brief, O.R.S. 12.160 to the effect that if, when a cause of action accrues, a person is insane or "in a sentence for less than life," time of disability shall not be counted. Hoffman's brief also states he was "stripped of civil rights January 10, 1952 when judged mentally ill. Only by virtue of a hearing June 18, 1956, was he restored to civil rights and adjudged competent." None of this is in the record. There is no allegation that at any time Hoffman was judged mentally ill or incompetent or adjudged competent or restored to civil rights. Since these matters do not appear in the record we may not consider them on this appeal.

(c) *The adding of Wair and Hansen as parties defendant on December 18, 1956.*

The original complaint was filed on January 16, 1954, but of the defendants who now appear in the caption and the body of the second amended complaint, only Halden and Keller were named in the original complaint. The amended complaint as set forth in the supplemental transcript of record does not contain a caption. There appears only "Title of district court and cause." The body of the complaint however, names Hansen, Halden, Wair and Keller. We assume from that, they were named in the caption. We do not consider this too important, in that the caption of an action is only the handle to identify it and ordinarily the determination of whether or not a defendant is properly in the case hinges upon the allegations in the body of the complaint and not upon his inclusion in the caption.

The amended complaint was filed December 18, 1956, and by it, Wair and Hansen were made defendants. It was filed more than two years after the last overt act. The second amended complaint, with which we here deal, was filed March 4, 1957.

[*Questions Presented*]

Questions are thus presented, first as to whether the plaintiff by amending on December

18, 1956, and on March 4, 1957, could bring into the action defendants Wair and Hansen who were not named in the original complaint, and second, the application of the statute of limitations.

The general rule is that an amendment of a complaint, dates back to the filing of the original complaint, Rule 15(c), F.R.Civ.P., 28 U.S.C.A. Where the same defendant named in an amended complaint was named in the original complaint, no problem is ordinarily presented. But where new defendants are brought in after the running of the statute of limitations, the situation is entirely different. Where a defendant has been sued in a wrong capacity in an original complaint, an amended complaint filed beyond the statute of limitations has been held good, as against the plea of the statute.³¹

But where new defendants are brought into the action, without previous notice or service of process, a different situation exists. This is like the institution of a new action against the new parties.³² Prior to the filing of the amended complaint were defendants Wair and Hansen sufficiently apprised of the pendency of the action so as to prevent their reliance on an applicable statute of limitations? There is nothing in the record to so indicate. It is true the original complaint, in addition to charging Halden, Keller and two other named individuals also listed as John Doe, Jane Doe and Richard Roe, in the caption. The original complaint nowhere in the body thereof, states that the true identify of these fictitious parties was unknown to the plaintiff. Nor does there appear in the amended complaint or the second amended complaint, any allegation or statement or even indication that defendants Wair and Hansen, named for the first time in the amended complaint in December of 1956, and then named in the second amended complaint in March of 1957, were the persons designated by plaintiff in the caption of the original complaint as John Doe and Richard Roe.

We therefore have a situation where after a period of time has expired after the last overt act, certain defendants for the first time are named in an amended complaint. We conclude that the general rule that an amendment dates back to the filing of the complaint does not apply in this

31. See *Goodrich v. England*, 9 Cidr., 1958, 262 F.2d 298, where a discussion appears of this problem.

32. *Messelt v. Security Storage Co.*, D.C. Del. 1953, 14 F.R.D. 507.

situation as to these defendants, and that as to them the statute of limitations began to run on October 23, 1952 and that the filing of the action on January 16, 1954 did not toll the running of the statute, and only when the amended complaint was filed on December 18, 1956, was the running of the statute tolled.³³ Whether the statute of limitations had run by that time, we do not decide.

(d) *What law controls.*

With the exception of a one year statute of limitations in Section 1986, Title 42 U.S.C.A. and pertaining solely to the remedies contained in such section, there is no period of limitations contained within the Civil Rights statutes, or elsewhere in the federal statutes, pertaining to such cases. "That the action depends upon or arises under the laws of the United States does not preclude the application of the statute of limitations of the state is established beyond controversy by cases cited by * * * McClaine v. Rankin, (1905) 197 U.S. [154,] 158, 25 S.Ct. 410, 49 L.Ed. 702," O'Sullivan v. Felix (1914) 233 U.S. 318, 322, 34 S.Ct. 596, 598, 58 L.Ed. 980. In a civil rights case the applicable statute of limitations is that of the state wherein the action arose and the district court is located. Rules of Decision Act, 28 U.S.C.A. § 1652, Wilson v. Hinman, 10 Cir., 1949, 172 F.2d 914. This is the general rule in other types of actions, Cope v. Anderson, 1947, 331 U.S. 461, 463, 67 S.Ct. 1340,

33. Appellant in his briefs makes reference to the fact that another action was filed against Wair and Hansen at about the same time the original complaint was filed. This material appearing in a brief is not part of the record, and even if it were, would not affect our decision in this matter.

91 L.Ed. 1602; McClellan v. Montana-Dakota Utilities Co., 8 Cir., 1953, 204 F.2d 166, 168; Momand v. Universal Film Exchange, supra. Accordingly, the applicable state statute of limitations in Oregon controls, except insofar as the action is based on Section 1986, Title 42 U.S.C.A.

(e) *What is Oregon law?*

Having progressed this far, we come to unchartered seas. What is the applicable Oregon statute? Three of them have been referred to above.

Campbell v. City of Haverhill, 1895, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280, which dealt with problems arising from the lack of a limitations period in federal statutes concerning patents, laid down the guide that the state statute of limitations applicable to the federal right was that applicable to state actions of a similar nature.

We have been cited to no Oregon law which controls on the limitations problem. Our research develops Shelton v. Paris, 1953, 199 Or. 365, 281 P.2d 856, 858, which may assist with its definition of a "liability created by statute."

Since this problem of Oregon law was not adequately briefed below or considered by the trial court, and since the district judges in Oregon are familiar with Oregon law, we do not pass upon this question, but reserve it until such time as the district court in Oregon has studied and ruled on the question.

For the reasons stated above, the judgment of dismissal as to Wair is affirmed. The judgment is reversed as to Halden, Hansen and Keller and as to these three defendants the case is remanded to the district court for further proceedings.

CIVIL RIGHTS

Immunity—Federal Statutes

Bert W. JOHN v. Hon. Phil S. GIBSON, Chief Justice, Supreme Court of California, and Associate Justices thereof: John W. Shenk, Roger J. Traynor, Homer R. Spence, Marshall F. McComb, B. Rey Shauer, Jesse W. Carter, Raymond E. Peters.

United States Court of Appeals, Ninth Circuit, August 26, 1959, 270 F.2d 36.

SUMMARY: An inmate of a California state penitentiary brought a damage suit under federal civil rights statutes in a federal district court against the justices of the California Supreme

Court, alleging that in denying his three applications for a writ of habeas corpus they had deprived him of due process of law in violation of the Fourteenth Amendment. Plaintiff's motion for leave to proceed in forma pauperis was denied on the ground that the court had no jurisdiction because the common law immunity of judges from suit for any act performed concerning a matter in which jurisdiction existed is applicable to actions under federal civil rights statutes. A motion for leave to appeal in forma pauperis was denied because the issues raised by the appeal were frivolous, and the court also certified that the appeal was not taken in good faith. Plaintiff then renewed in the Court of Appeals for the Ninth Circuit his motion for leave to appeal in forma pauperis. The motion was denied, and the appeal dismissed, the court holding that a judge's absolute immunity from civil suits for his judicial acts applies to actions under the civil rights statute, "irrespective of the motives with which those acts are alleged to have been performed" and "however much the confinement complained of may have been in violation of constitutional rights."

CIVIL RIGHTS

Immunity—Federal Statutes

Charles LARSEN v. Phil S. GIBSON, Chief Justice, Supreme Court of California and Jesse W. Carter, Associate Justice, Supreme Court of California.

United States Court of Appeals, Ninth Circuit, May 15, 1959, 267 F.2d 386.

SUMMARY: An individual seeking release from custody filed a petition for a writ of habeas corpus with the California Supreme Court addressed to an associate justice thereof, which petition was denied by an order of the court signed by the chief justice without formal opinion. The unsuccessful petitioner then brought an action in a federal district court seeking a recovery against those two state supreme court justices under the federal Civil Rights Act. A summary judgment dismissing the complaint was entered, and the Court of Appeals for the Ninth Circuit affirmed, holding that the defendant justices "are immune to suit for damages for acts performed in the course of their official duties. Such traditional immunity has not been altered by the Civil Rights Act."

CIVIL RIGHTS

Immunity—Federal Statutes

Frank STIFT and Thomas Williams, a minor by Frank Stift, his next friend v. Stanley A. LYNCH, Ted Eichholz, Paul Daw, William L. Guild and Edwin L. Douglas.

United States Court of Appeals, Seventh Circuit, May 11, 1959, 267 F.2d 237.

SUMMARY: A damage suit was brought in a federal district court in Illinois under the federal Civil Rights Act, the two parties plaintiffs alleging that under color of law five defendants—the sheriff, deputy sheriff, justice of the peace, state's attorney, and assistant state's attorney of a certain Illinois county—had conspired against and deprived them of rights, privileges, and immunities secured by the constitution and laws of the United States. The complaint

charged that plaintiffs, while hunting in a county forest preserve with legally authorized firearms, were arrested by the sheriff and deputy, who refused to state grounds therefor; that they were made to drive thirty miles to appear before the justice of peace and were held under custody for two hours until a complaint was filed charging a violation of a county ordinance against carrying firearms in a forest preserve; that, when they subsequently appeared for trial, the assistant state's attorney over their objection moved the court to enter a nolle prosequi and this was done; that they were immediately arrested again by the sheriff and his deputies and transported to the county jail; that an excessive bail of \$1000 (later reduced to \$200) was set although the maximum fine for the offense charged was \$200, and they were jailed until they had raised the bail; and that they were finally found not guilty in a jury trial in county court. The federal district court dismissed the complaint, and the Court of Appeals for the Seventh Circuit affirmed. Although the court characterized the alleged conduct of defendants as unjustified and reprehensible, and noted that the Civil Rights Act speaks in terms of "every person" being liable to one whose federal rights are trespassed upon under color of law, it held that the prosecuting officials are judicial officers whose common law immunity to civil liability for official acts extends to Civil Rights Act cases; and, despite the fact that the common law immunity of judges had never been extended in Illinois to justices of the peace, this case as a non-diversity suit was not controlled by state law, and defendant justice of peace was held to be immune for his exercise of judicial functions. It was also held that the complaint did not state a claim under the Civil Rights Act upon which relief could be granted against the sheriff and deputy, under the rules that injuries caused by wrongs punishable under state law and not sustained in a violation of privileges and immunities incident to United States citizenship do not create a cause of action under this Act, and that federal courts will rarely interfere with state officials carrying out duties under state laws.

CIVIL RIGHTS

Limitations—Federal Statutes

Paul EGAN v. CITY OF AURORA, a Municipality under the laws of the State of Illinois, Leo Boucon, William G. Konrad, H. A. Wyeth, Sr., William B. Robertson, Donald Curran, Hershell Stover, LeRoy Stroud, Anthony Rukas, John (Jack) Pfeifer, Ray Schuhow, John Day, and Charles Darling.

United States District Court, Northern District, Illinois, Eastern Division, June 10, 1959, 174 F. Supp. 794.

SUMMARY: The Mayor of Aurora, Illinois, brought an action in federal district court against that city and named individuals, alleging that certain of the individual defendants, while purporting to act as police officers enforcing a breach of peace statute, arrested him without warrant and without probable cause while he was conducting a public meeting at the city hall. He alleged that such action was taken as a result of a conspiracy between these individuals and the other individual defendants, acting as individuals and as City Commissioners and as the purported corporation counsel, to deprive plaintiff of his rights to freedom of speech and assembly under the Fourteenth Amendment and in violation of federal Civil Rights Acts. The court, noting that due consideration for "delicate state-federal relationships" requires federal courts to place a narrow construction of these Acts, dismissed the case. It was held that no cause of action was stated against the city because of its common law immunity. The allegation of conspiracy between the police, city commissioners, and corporation counsel was held to be a mere conclusion unsupported by allegations of fact and not, therefore, to state

a cause of action under the Civil Rights Acts. It was also held that a cause of action was not stated against defendants as private individuals since the Civil Rights Acts provide no remedy for the wrongful acts of such individuals. Finally, it was held that no cause of action was stated against police officers for seizing and incarcerating plaintiff, because they were not alleged to have acted officially but only as having "purported" to do so. However, the court added that, even assuming that a cause of action had been stated, the cause would still be dismissed because defendants were justified in invading plaintiff's rights to free speech and assembly on the occasion in question when he asked the assemblage to "bear arms" in order to "throw off the yoke of absolute monarchy and potential slavery," creating a clear and present danger of substantive evils within the power of governing officials to prevent, and there was no proof but that defendants acted in the good faith performance of their duties.

CIVIL RIGHTS

State Action—California

Claudia WALKER v. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, and Transamerica Corporation.

United States Court of Appeals, Ninth Circuit, May 22, 1959, 268 F.2d 16.

SUMMARY: A national banking association and its parent corporation were sued in a federal district court in California by a former woman employee, who alleged that they had individually and in conspiracy with each other and with certain state and federal officials and agencies committed fraudulent and unlawful acts against her, including demanding her resignation because she had informed a federal agency of assertedly illegal practices by them, and concealing from her next of kin, after receiving notice that she had become ill, the fact that she was entitled to state workmen's compensation benefits. She alleged further that, as a result of these wrongful acts, she underwent a long period of illness, was unnecessarily and illegally committed to an institution, and suffered physical pain, mental suffering, humiliation, and damage to reputation. The action was dismissed for lack of federal jurisdiction, and the Court of Appeals for the Ninth Circuit affirmed. It was held that general allegations of deprivation of equal protection and of equal privileges and immunities were but legal conclusions unsupported by allegations of facts sufficient to bring the case under the Civil Rights Act; that the individual acts of defendants were not state action, and alleged conspiracies between them and various state officials and agencies were unrelated to any constitutional or statutory provision concerning equal rights of citizens; and that allegations of acts discriminating between persons and classes of persons were unsupported by factual allegations and were inadequate, therefore, to state a cause of action under the Act. The United States Supreme Court denied certiorari. 28 L.W. 3167, 4 Race Rel. L. Rep. 852, *supra* (1959). Excerpts from the Court of Appeals opinion dealing with the Civil Rights Act are reprinted below. The footnotes have been renumbered.

Before POPE, CHAMBERS, and HAMLEY, Circuit Judges.

HAMLEY, Circuit Judge.

Appearing in propria persona, Claudia Walker brought this action to recover special and general damages in the sum of \$1,056,996. Named

as defendants in the original complaint were Bank of American National Trust and Savings Association (Bank of America) and Transamerica Corporation (Transamerica). Responsive to a motion made by defendants, the district

court dismissed the action for lack of jurisdiction.

[*Complaint Allegations*]

In the complaint it is alleged that in 1939 Miss Walker was an employee of Bank of America, a national banking association, of its affiliate, Bankamerica Agricultural Credit Corporation, and of Transamerica, a Delaware corporation of which Bank of America was a wholly-owned subsidiary. It is further alleged that on October 23, 1939, she resigned this employment on account of ill health.¹ It is alleged that her illness, which included a nervous breakdown, resulted from worry and strain occasioned by close contact with a wide variety of assertedly improper and illegal banking practices by her superiors, inadequate salary, and an unreasonably heavy work load. It is also alleged that her resignation was wrongfully demanded because she had informed the Securities and Exchange Commission of certain assertedly illegal practices being carried on by Bank of America, Transamerica, and subsidiaries of the latter company.

The complaint also contains allegations to the following effect: After her resignation Miss Walker was illegally committed to the Stockton State Hospital.² An attorney, Arthur Brouillet, employed by her mother, notified officials of Bank of America of Miss Walker's illness and of the immediate need for funds in the sum of two hundred dollars for medical care. Notwithstanding receipt of this notice of her illness, defendants fraudulently concealed from Miss Walker's next of kin—her mother—that Miss Walker was entitled to six thousand dollars in workmen's compensation benefits from the State of California. Miss Walker did not learn until 1948 that the bank had been given timely notice of the illness. It was not until about November 15, 1953, that she received proof that the bank had received such notice. This proof consisted of copies of letters which Brouillet had written to the bank and to appellant's mother in December 1939.

All of the assertedly fraudulent and unlawful acts referred to above, it is alleged, were accomplished by appellees individually and in con-

spiracy with each other and with certain state and federal officials and agencies. As a result, appellant alleges, she underwent a long period of illness, was unnecessarily and illegally committed to an institution, and suffered physical pain, mental suffering, humiliation, and damage to reputation. General damages in the sum of one million dollars and special damages in the sum of \$56,996 are sought.³

[*Civil Rights Act Invoked*]

Before any responsive pleading was served, Miss Walker amended her complaint by adding thereto a new paragraph XV. By this amendment appellant sought to invoke jurisdiction under the Civil Rights Act, particularly 28 U.S.C.A. § 1343, and 42 U.S.C.A. §§ 1983 and 1985(3).

The remaining jurisdictional allegations of the original complaint as amended and as proposed to be amended are designed to invoke jurisdiction under the Civil Rights Act. In this connection appellant relies upon 28 U.S.C.A. § 1343 and 42 U.S.C.A. §§ 1983 and 1985(3).

[*Sections 1343 and 1985*]

Section 1343 provides that district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to recover damages or to redress the deprivation of rights resulting from four kinds of conduct or inaction. The first two of these, as defined in paragraphs (1) and (2) of section 1343, pertain to a conspiracy or other wrong mentioned in 42 U.S.C.A. § 1985. In order to determine whether appellant has stated any cause of action under either of these first two paragraphs of 28 U.S.C.A. § 1343, it is therefore necessary to look at 42 U.S.C.A. § 1985.

The conspiracies set forth in that section relate to interferences with the holding of public office and the performance of the duties thereof (subsection (1)); interferences with due course of justice (subsection (2)); and deprivation of the equal protection of the laws, or of equal privileges and immunities under the law, or hindering constituted authorities in affording equal protection, or interference with federal

1. Although Miss Walker's service was terminated at this time, she was retained on the payroll until January 23, 1940.

2. It is alleged that because of the illegality of this commitment the record thereof was officially expunged on February 1, 1946.

3. The twenty-seven-page complaint contains a great many other allegations, most of which are redundant or immaterial and some of which are impertinent and scandalous within the meaning of Rule 12 (f), Federal Rules of Civil Procedure.

elections (subsection (3)). *Agnew v. City of Compton*, 9 Cir., 239 F.2d 226, 233.

There are no facts pleaded which would invoke subsection (1) or (2) of section 1985. Concerning subsection (3), there are general allegations to the effect that appellant was denied the equal protection of the laws and equal privileges and immunities under the laws. These are not allegations of fact but the statement of legal conclusions. There are no facts alleged which tend to show that appellees deprived appellant of these constitutional rights.⁴

It follows from what has just been said that the original complaint, as amended and proposed to be amended, does not state a cause of action under the first two paragraphs of 28 U.S.C.A. § 1343.

The third paragraph of that section relates to deprivations of a right, privilege, or immunity secured by the Constitution or any federal statute "providing for equal rights of citizens * *," when such deprivation is accomplished "under color of any State law, statute, ordinance, regulation, custom or usage."

Appellant has alleged in effect that the acts of appellees of which she complains were done under color of state law. This general allegation, however, is not supported by the complaint read as a whole. A person does not act under color of state law unless he acts, or purports to act, on behalf of the state as a state official, or in conspiracy with a person so acting. *Schutte v. International Alliance*, 9 Cir., 182 F.2d 158, 167. There is no allegation that Bank of America or Transamerica acted, or purported to act, as a state agency.

There are allegations to the effect that appellees entered into a conspiracy with various state officials and agencies.⁵ But the subject matter of such asserted conspiracies, as alleged in the complaint, had nothing to do with any constitutional provision or statute "providing for equal rights of citizens * *." This is an essential element in stating a cause of action under section 1343(3).

It is therefore our opinion that the original complaint, as amended and proposed to be

amended, does not state a cause of action under section 1343(3).

Paragraph (4) of section 1343 authorizes the recovery of damages or the securing of other relief under any statute "providing for the protection of civil rights, including the right to vote." The pleadings here in question do not contain allegations of a kind which give application to any such statute.

[Section 1983]

The second civil rights statute sought to be invoked by appellant is 42 U.S.C.A. § 1983. A right of action to recover damages or other relief is therein provided against any person who, under color of state law, subjects, or causes to be subjected, any person within the state "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

In order to state a cause of action under section 1983 it is necessary to allege facts showing that the purpose of the defendants in committing the acts complained of was to discriminate between persons or classes of persons. *Agnew v. City of Compton*, supra, 239 F.2d at page 231. In the instant case, as in the *Agnew* case, there are general allegations to the effect that appellees had such a purpose. But these general allegations are unsupported by the factual allegations of the complaint read as a whole, and are therefore inadequate to state a cause of action under section 1983.⁶

The remaining civil rights statute cited by appellant, 42 U.S.C.A. § 1985(3), has been fully discussed in connection with the consideration of 28 U.S.C.A. § 1343.

It is our view that the district court correctly held in its memorandum and order of January 28, 1958, that the complaint, as amended and proposed to be amended, does not state a cause of action under the Civil Rights Act.

Having reached the conclusion that the pleading under discussion does not show jurisdiction on any ground, we hold that the trial court did not err in entering the order of January 28, 1958, dismissing the action.⁷

6. If any purpose of appellees is factually asserted in these pleadings, it is the private one of furthering their own business plans and avoiding the expenditure of funds.

7. Pursuant to Rule 15(a), Federal Rules of Civil Procedure, appellant had already amended her complaint once as a matter of course. Accordingly, she was not entitled to an order merely dismissing the complaint, and does not make such a contention here.

4. See *Collins v. Hardyman*, 341 U.S. 651, 661, 71 S.Ct. 937, 95 L.Ed. 1253; *Whittington v. Johnston*, 5 Cir., 201 F.2d 810, 811.

5. The then State District Attorney, State Board of Control, State Industrial Accident Commission, and possibly other state officials and agencies.

CIVIL RIGHTS

State Action—Georgia

A. E. DeLOACH v. Candler ROGERS and Mark Dukes (Dora S. Rogers as Administratrix of the estate of Candler Rogers, deceased, substituted as party appellee in place of Candler Rogers, deceased).

United States Court of Appeals, Fifth Circuit, July 30, 1959, 268 F.2d 928.

SUMMARY: A Georgia resident brought a damage suit in federal district court against a county sheriff and his deputy for physical injuries and nervous shock allegedly caused by defendants, who, on the strength of an illegally issued peace warrant, had come to his home, assaulted him and taken him to jail, although he had committed no offense, after which he was released on bond, without any charge having been lodged against him nor his case having been brought to trial. It was also averred that defendants' acts were done under the guise of their offices and constituted acts of the state against him and in pursuance of a conspiracy to intimidate him from exercising his rights as an American citizen to defend his property and to exercise freedom of speech, in violation of Article 4, Section 2, and of the Fourth, Fifth, and Fourteenth Amendments to the federal constitution and the federal Civil Rights Act. The action was dismissed for lack of jurisdiction. On appeal, the Court of Appeals for the Fifth Circuit affirmed, stating that at most the facts alleged a cause of action for false arrest and for assault and battery incidental thereto, not involving class or racial discrimination. It was pointed out that the federal district courts do not have jurisdiction for redress of every violation of constitutionally guaranteed rights, but that such cases, if properly brought in a state court, may ultimately come before the United States Supreme Court for decision.

CIVIL RIGHTS

State Action—New York

Thomas O. SPAMPINATO and Jane B. Spampinato v. M. BREGER & CO., Inc., Miles Breger, Dr. Guenther E. Winkler, Dr. Solomon Adelman, Dr. Max Weissman, Dr. Richard Perrault, The City of New York.

United States District Court, Eastern District, New York, July 9, 1958, 176 F. Supp. 149; September 22, 1958, 176 F.Supp. 278.

United States Court of Appeals, Second Circuit, June 23, 1959, 270 F.2d 46.

SUMMARY: A landlord brought an action against a tenant in a New York City municipal court, which resulted in the tenant's eviction for non-payment of rent. The matter ultimately came before the Court of Appeals for the Second Circuit, which also rendered a decision adverse to the tenant. 226 F.2d 742 (2d Cir. 1955), *cert. denied*, 350 U.S. 973 (1956). Alleging deprivation of their constitutional rights in violation of the federal Civil Rights Act, the tenant and his wife brought an action for damages in a federal district court against the landlord, four named physicians, and the city of New York. The court dismissed the complaint against the landlord, who was charged with having defamed plaintiffs in the conduct of the state court litigation, stating that the Act does not apply to an invasion of one's personal rights by another individual not acting under color of state law, in the absence of a conspiracy to deprive one (or a class of persons) of equal protection of the laws, or equal privileges and immunities under the law, or to prevent or hinder authorities from giving or securing to

all persons the equal protection of the laws. 166 F.Supp. 33, 4 Race Rel. L. Rep. 95 (1958). A motion for reargument or for leave to appeal was denied. 176 F.Supp. 278. On the same reasoning, the court also dismissed an amended complaint which alleged that the remaining defendants had violated plaintiff's civil rights in connection with his committal to a public hospital, a committal which was later set aside by the state supreme court. 176 F.Supp. 149. The Court of Appeals for the Second Circuit affirmed the decision for the landlord on the reasoning stated by the district court; for one of the physicians, a psychiatrist, because he was found to have been acting only as a private person none of whose acts deprived plaintiffs of equal protection of the laws; and for the remaining three physicians and the city who, although acting with state authority, were not alleged (as required by the Civil Rights Act) to have acted as the result of intentional discrimination against plaintiffs or so as to deprive them of due process by the committal procedure.

CIVIL RIGHTS STATUTES

State Action—Illinois

Eleanor B. JOHNSON v. Theodore STONE et al.

United States Court of Appeals, Seventh Circuit, June 29, 1959, 268 F.2d 803.

SUMMARY: A defendant in an Illinois state court action sought in federal district court to recover damages for allegedly tortious conduct by plaintiffs in the state action, their attorneys and witnesses there, the state trial court clerk and bailiff, and others involved in the action. Various ones of the defendants herein were charged with having misappropriated exhibits, introduced perjured, irrelevant, and slanderous testimony, and made improper, irrelevant, slanderous and untrue statements at the state court trial. The defendants herein were asserted to have violated federal civil rights statutes by, under color of law, depriving plaintiff of due process of law and a fair and impartial jury verdict, and conspiring to defeat the due course of justice and to deny plaintiff equal protection, equal privileges and immunities, and a fair trial and jury verdict. The federal district court dismissed the complaint, and, on appeal, the Court of Appeals for the Seventh Circuit affirmed because of a failure to show a federal civil rights violation. Rather, it was held that the abuses complained of arose out of private rights and rights conferred by state law, and therefore failed to constitute the state proceedings a "complete nullity, with a purpose to deprive a person of his property without due process of law," as would be necessary to make out a cause of action under the civil rights statutes.

CIVIL RIGHTS**State Action—Oregon**

Paul R. BAILLEAUX v. Robert D. HOLMES, Governor of Oregon, Mark O. Hatfield, Secretary of State, and Sig Unander, State Treasurer, constituting the Oregon State Board of Control, Clarence T. Gladden, Warden, and Lewis R. Barnes, Deputy Warden, of the Oregon State Penitentiary.

United States District Court, District of Oregon, October 2, 1959, 177 F.Supp. 361.

SUMMARY: Certain prisoners in the Oregon state penitentiary brought a class action under the federal Civil Rights Act against the governor and other state officials. Each plaintiff alleged that he is under illegal confinement or faced with the necessity of defending pending criminal charges, and that he is required to make immediate legal preparation himself because of financial inability to engage a lawyer, and that defendants acting under color of state law have conspired to deny him his constitutional rights to full, free, and speedy access to the courts by imposing excessive and unreasonable restrictions on law study and preparation of legal documents. Declaring that a prisoner representing himself should have, so far as possible, the same opportunities to prepare his case as one with an attorney, the court held that prisoners have a right to adequate access to legal materials free of regulations that distinguish lawbooks from other printed matter. It was further held that the right of prison officials to open and inspect prisoners' mail must not be used unnecessarily to delay communications to attorneys or courts with the possible result of effectively denying a prisoner's right of access to the courts. Concerning the argument that prisoners' legal documents discovered outside the prison library could be confiscated because prisoners have no right to personal property, the court said that the right to be heard in court is not a property right, and papers directed to courts must not be suppressed merely because prepared in a cell rather than in a library. Further, the prison rule that those in isolation may not initiate court action, communicate with counsel, or have access to legal materials must yield to the basic right to have access to the courts. On the other hand, it was held that withholding a percentage of prisoners' funds in reserve until their release was reasonable and not an invasion of constitutional rights even though as a result they were not able to use all their funds to buy legal materials or to pay legal fees.

SOLOMON, Chief Judge.

Plaintiffs are prisoners in the Oregon State Penitentiary at Salem, Oregon. Defendants are the Governor, Secretary of State, and the State Treasurer, comprising the State Board of Control, and the Warden and Deputy Warden of the penitentiary.

Each of the plaintiffs asserts either that he is illegally confined or that he must defend criminal charges pending against him in state or federal courts, that he is required to do all or part of the legal preparation himself because he cannot afford to engage an attorney, and that these matters require his immediate attention. Plaintiffs further allege that they are being unlawfully denied full access to the courts by the imposition of excessive restrictions on law study and preparation of legal documents. They bring this action under the Civil Rights Act, 28 U.S.C.A. § 1343, 42 U.S.C.A. § 1983, providing

for redress of deprivation of civil rights by persons acting under color of state law.

[Conspiracy Charged]

In their amended and consolidated complaint they allege that the defendants in their official capacities have conspired to prevent plaintiffs from exercising their constitutional right to free and speedy access to the courts. Plaintiffs claim that the following restraints, among others, are unreasonable and unlawful: (1) Prisoners may not study law or prepare legal documents in their cells; they must do this work in a prison law library open only to a limited number of prisoners for limited periods of time; (2) prisoners are severely restricted in their ability to purchase or receive law books or statutes, even though they are not available in the prison library; (3) defendants impose special censorship on legal documents and communications

with courts and attorneys; (4) defendants confiscate legal documents found in prisoners' possession outside the library; (5) prisoners in isolation are denied all access to the courts, counsel, and their legal papers; (6) prisoners may not use all of their funds to purchase legal materials or pay legal fees.

The complaint requests relief from these restrictions for themselves and for others similarly situated.

Defendants deny the allegations of conspiracy. They admit most of the specific restrictions, but they assert that such restrictions are not unlawful because they are reasonable and necessary. Defendants further assert that these restrictions do not substantially curtail plaintiffs' opportunities to be heard in the courts.

At the trial all of the plaintiffs and all of the defendants testified in person. At the conclusion of the testimony, the Court found that the plaintiffs had not proved the existence of any conspiracy and that other issues set forth in the pleadings which relate to typing, mailing and notarization privileges, and isolated instances in which prisoners were denied use of materials either were not proved or did not raise any issue cognizable in this Court as a violation of constitutional rights.

The Attorney General suggests that the recently-enacted "Post-Conviction Hearing Act", Oregon Laws 1959, c. 636, which provides for legal assistance to indigent prisoners will cure or make moot the evils of which the plaintiffs complain. This humane and admirable legislation will solve the problems of those plaintiffs who have matters in the Oregon courts. However, the Act neither purports to nor does it relate to proceedings in the federal courts or in the courts of states other than Oregon. Likewise prisoners may if they desire represent themselves. Even though some of these issues are no longer applicable to some plaintiffs, they are applicable to others, and we are therefore answering all of them.

LIMITATIONS ON LAW STUDY

Present regulations require that law study and the preparation of legal papers be confined to the law library. The library is open approximately thirty hours a week, during which time a limited number of prisoners, by appointment, are permitted to work on legal matters. No

prisoner in the general population is permitted to study law or keep any legal documents or memoranda in his cell. Prior to the commencement of this action only four prisoners could use the facilities of the law library concurrently. Subsequently the number was increased to eleven. In the past prisoners had often been delayed for several days, and occasional delays still occur. Prisoners employed in special jobs are further restricted when library periods coincide with their work schedules. Absence from work to pursue legal matters may result in an unfavorable report which, in turn, reduces a prisoner's "good time".

Most prisoners spend fourteen hours a day in their cells. Prisoners may keep a limited quantity of study materials, as well as books, magazines, courses including correspondence courses, and personal papers.

Plaintiffs need more time than they are presently afforded to prepare their legal matters adequately. With no legal training, many are forced to represent themselves under conditions which an experienced attorney would find intolerable. Prison officials insist that these restrictions are required to curb the activities of the "cell-house lawyers", and to avoid the storage problem resulting from accumulation of legal materials in the cells.

The Court appreciates the fact that prison authorities must maintain effective discipline, and must prevent unscrupulous prisoners from preying on the weak and ignorant. However, this end may not be achieved by stifling the study of law, where such study is necessary to the effective utilization of a basic right. This does not mean that the prison authorities are powerless to prevent the accumulation of massive legal libraries in the cells. Regulations can be designed to avoid the excessive storage of materials in cells without restricting the actual use of these materials in the cells when needed.

RESTRICTIONS ON LAW BOOKS

The prison law library has one or two volumes of Corpus Juris Secundum and a copy of the criminal sections of the Oregon Revised Statutes. Prisoners may not purchase or receive from outside sources any treatises or statutes. They may not even acquire copies of individual cases from any source other than the publisher. These are expensive and not always available.

The prisoners contend that these restrictions

prevent them from adequately representing themselves both at trial and on appeal. Prisoners have the right to represent themselves and, an indigent prisoner who is required or elects to represent himself should, so far as possible, have the same opportunities to prepare his case as one represented by an attorney. Without law books, a competent and experienced lawyer would find it difficult to prepare a defense or an appeal. Without such books, a prisoner, without legal training or experience, finds it virtually impossible.

Prison officials contend that to permit prisoners to purchase law books would add to their burden of censoring incoming mail, and create a space problem. If law books are necessary to due process, these considerations are immaterial. Judge Medina, noting the inconvenience caused by the flood of habeas corpus petitions nevertheless stated, "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency." *United States ex rel. Marcial v. Fay*, 2 Cir., 247 F.2d 662, 669, affirmed 355 U.S. 915, 78 S.Ct. 342, 2 L.Ed.2d 274. This principle is equally applicable here.

Defendants rely upon *Piccoli v. Board of Trustees and Warden*, D.C.N.Hamp. 1949, 87 F.Supp. 672. In that case, the Court held that the refusal of prison officials to permit a prisoner to possess a set of New Hampshire statutes was not a deprivation of the prisoner's rights of freedom of speech and of the press serious enough to warrant the extraordinary remedy of injunction. The opinion did not consider the relation between possession of law books and the right of a prisoner to have access to the courts. However, insofar as that opinion may indicate a belief that prisoners can have no right to the possession of law books, we disagree.

The Court is satisfied that adequate access to legal materials can only be achieved through the termination of regulation which distinguishes between the acquisition of legal materials and other printed matter.

CENSORSHIP OF LEGAL COMMUNICATIONS

The prisoners contend that their communications to and from attorneys and courts are subject to special inspection and censorship and that such communications, including documents

intended to be filed in court, are delayed longer than are reasonably necessary for inspection.

The Court recognizes that the opening and inspection of mail between prisoners and those at liberty is an essential incident to the safe custody of prisoners, particularly in the suppression of traffic in contraband. Letters between prisoners and their attorneys are not exempt from this type of control. *Green v. State of Maine*, D.C.Me.1953, 113 F.Supp. 253; *United States ex rel. Vraniak v. Randolph*, D.C.Ill.1958, 161 F.Supp. 553.

However, the right to inspect should not be used unnecessarily to delay communications to attorneys or the courts since such delay could amount to an effective denial of a prisoner's right to access to the courts. Likewise, the right to inspect and censor does not give prison authorities the right to pass upon the sufficiency of legal pleadings. *Ex parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034.

CONFISCATION OF LEGAL DOCUMENTS

Prison officials confiscate and retain as contraband prisoners' legal documents, including petitions addressed to courts, discovered outside the prison library.

Defendants argue that prisoners have no right to possess personal property. They assert that property possessed in violation of regulations must be confiscated if discipline is to be maintained.

The right to be protected is not a property right; it is the right to be heard in the courts. Prison officials may not enforce rules which suppress papers directed to the courts. *Dowd v. U. S. ex rel. Cook*, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215; *Ex parte Hull*, supra. That is precisely the effect of the present regulation.

Prison officials may and should regulate the conduct of prisoners and punish the violation of regulations. However, we do not believe that a communication or a pleading addressed to an attorney or court relative to a pending or contemplated legal action is subject to confiscation solely because it was prepared in a cell rather than in the library.

PRISONERS IN ISOLATION

Prisoners in isolation may not initiate court action, communicate with counsel, or have access to legal materials.

Isolation is a traditional and effective method

of punishment. No evidence was presented to indicate that isolation was imposed discriminately upon prisoners engaged in legal work. In addition, granting prisoners the right to contact courts and attorneys, and to use legal materials will probably impair the efficacy of isolation as punishment. Nevertheless, administrative control, even if reasonable and moderate, must yield to the basic right to have access to the courts.

RESTRICTION OF PRISONERS' FUNDS

Prisoners complain that they are not permitted to use all of their funds to buy legal books, transcripts, and materials, or to pay legal fees.

The Warden asserts that Oregon Law requires him to hold part of the prisoner's money, from any source, to provide a small reservoir of cash for the prisoner upon release. The prison regulation which requires the segregation of 25% of a prisoner's funds in a savings account is directly authorized by ORS 421.125(5):

"The warden shall safeguard the moneys standing to the credit of each individual convict, whether such moneys are from outside sources or from earnings of the convict while in the penitentiary, to the end that in so far as possible the convict will have at least \$50 to his credit on discharge, or at least \$25 to his credit on parole."

In our view both the statute and the regulation are reasonable and do not infringe plaintiffs' constitutional rights.

The Court wishes to express its gratitude to all counsel for their painstaking and exhaustive efforts in connection with the many issues involved in these proceedings. We are particularly grateful to Louise Jayne, Richard W. Sabin, Cecil H. Johnson and William E. Love, all of whom were court appointed and served without compensation at great personal sacrifice. The amicus curiae brief submitted by the American Civil Liberties Union of Oregon was of its usual high quality.

CIVIL RIGHTS

State Action, Immunity—Federal Statutes

Nell LYNN v. Judge J. Russell McELROY et al.

United States District Court, Northern District, Alabama, Southern Division, September 16, 1959, 176 F.Supp. 661.

SUMMARY: An Alabama citizen, against whom an adverse judgment had been rendered in a slander suit in a state circuit court, filed a complaint in federal district court against the judges, solicitor and clerk of the state court, the attorneys of the opposing party, and other minor state judicial officials, charging a violation of federal Civil Rights Acts. Defendants in the instant action were accused of having, in the previous action, conspired and threatened, intimidated and bribed plaintiff's witnesses; filed false answers to motions; falsified court records; victimized plaintiff; denied her representation by counsel and made it impossible by bribes, intimidation, and other influence for her to trust anyone; threatened her because she gave evidence to the federal Internal Revenue Service and Department of Justice; threatened, bribed, and intimidated her detective; and collaborated with many high state and city officials and told lies in order to defend their actions. The court held that the complaint was defective for failing to allege that defendants' alleged acts were committed in their respective official capacities in discharge of official duties under color of office, or in any way under color of state law, custom, or usage; or that in their respective private capacities they had conspired or acted to obstruct justice in the state courts or acted with an intent to discriminate against any person or class so as to deny equal protection of the laws or to deprive

a United States citizen of privileges and immunities. It was noted that even if it were alleged that defendants had acted under color of statute, the judges would be immune to liability under the Civil Rights Act for judicial acts however wrong and corrupt, and the mere averment of a conclusion that the other defendants had so acted would not be sufficient to state a claim under federal law. The complaint was dismissed, but plaintiff was granted 30 days within which to amend it if she so desired.

CONSTITUTIONAL LAW

Ratification—Fourteenth Amendment

Mrs. M. B. BUFORD v. STATE of Texas.

Court of Civil Appeals of Texas, January 28, 1959, 322 S.W.2d 366.

SUMMARY: Holders of bonds issued under an 1861 Act of the Texas legislature sued the state of Texas in a state court for payment thereon. In defense, the state contended, among other things, that it is forbidden by Section 4 of the Fourteenth Amendment to pay the bonds, as they represent debts incurred in rebellion against the United States. In answer to this contention, plaintiffs argued that "the Fourteenth Amendment to the Federal Constitution was unlawfully adopted by the various states and is void." A judgment for defendant, on the ground that the cause of action, if any, was barred by a two-year statute of limitations contained in the 1951 legislative act granting consent by the state to be sued on the bonds, was affirmed by the Texas Court of Civil Appeals. It was, therefore, found not necessary to consider the contention that the Fourteenth Amendment is void. The Supreme Court of the United States denied a petition for certiorari. 28 L.W. 3110, 4 Race Rel. L. Rep. 538 (1959).

CONSTITUTIONAL LAW

State Sovereignty Commission; Records and Reports—Arkansas

Roland SMITH et al. v. Orval FAUBUS, Chairman, et al.

Supreme Court of Arkansas, September 14, 1959, 327 S.W.2d 562.

SUMMARY: Ten Negro ministers in Arkansas brought a class action in federal court against the governor of Arkansas, as chairman of the State Sovereignty Commission, and the members of the commission. The complaint [2 Race Rel. L. Rep. 1103 (1957)] asked for the convening of a three-judge district court and a declaration of unconstitutionality of Arkansas Acts 83, 84, 85, and 86 of 1957 [2 Race Rel. L. Rep. 491, 453, 495, and 456 (1957)], as depriving plaintiffs and the class they represent of the equal protection of the laws. The court, applying the doctrine of equitable abstention [see 2 Race Rel. L. Rep. 1215, (1957)], ordered a stay pending construction of the statutes in question by courts of the state of Arkansas. 2 Race Rel. L. Rep. 1103 (E.D. Ark. 1957). In a similar complaint filed in an Arkansas chancery court, plaintiffs asked that Acts 83 and 85 be declared unconstitutional and that defendants be enjoined from enforcing them. Act 83 created the State Sovereignty Commission to "protect the sovereignty of the State of Arkansas, and her sister states from encroachment thereon by the Federal Government," and gave the commission author-

ity to provide advice and legal assistance to school districts upon matters "involving civil or criminal litigation or otherwise, relating to the commingling of the races in the public schools of the State." Act 85 requires the registration of persons and organizations promoting school desegregation by legislation or litigation, and further requires the keeping of records regarding contributions and expenditures and the making of periodic reports to the State Sovereignty Commission. In dismissing the complaint the court held that the Acts are not unconstitutional on their face and that it was not established that they had been or would be unconstitutionally administered. 3 Race Rel. L. Rep. 978 (Ark. Chanc. Ct. 1958). Plaintiffs appealed to the Arkansas Supreme Court. Provisions of Act 83 for appointing to the commission two senators and three representatives from the state general assembly were held contrary to a state constitutional prohibition against legislative members being appointed or elected "to any civil office under this State." Another section of Act 83, interpreted as permitting the commission, without search warrants or judicial process, to examine anyone's records, books, documents, and other papers concerning matters about which it was authorized to investigate, was held to be violative of the state constitutional guarantee of the right to be secure against unreasonable searches and seizures. However, the claim that Act 83 is unconstitutional on its face for interfering, through racial discrimination, with the rights of plaintiffs as citizens was rejected, though the court recognized that the administration of the Act "may lead to matters that will require further court action." As Act 83 has a separability clause and as a remedial statute is to be construed liberally in order to effectuate its purposes, the court allowed the sections not specifically declared unconstitutional to stand. Concerning Act 85, the court declared void provisions requiring registration with the commission of persons who collect money to be used to influence the passage of certain legislation by Congress, because the federal regulation of lobbying act, requiring some of the same information to be furnished to the House of Representatives, precludes action by the state on the same matter. Because Act 85 contains no separability clause, and as a penal statute is to be strictly construed for the protection of the citizen, and because the court could not say that it would have been enacted without the invalidated section, Act 85 was held to be void in its entirety.

McFADDIN, Justice.

This appeal presents for decision the validity of Acts 83 and 85 of the 1957 Arkansas General Assembly. Appellants, Smith et al., were plaintiffs below. They filed suit for declaratory judgment, *inter alia*, and claimed that both of the said Acts were void. Appellees, Faubus et al., were defendants below, and constitute the membership of the State Sovereignty Commission created by the said Act No. 83. The Chancery Court held both Acts to be valid and dismissed the complaint. This appeal resulted in which eleven points¹ are urged by appellants against the validity of one or the other of the

Acts. For convenience we will consider separately the two legislative enactments.

ACT NO. 83

This Act is captioned: "An Act Creating the State Sovereignty Commission; Defining Its Powers and Duties; and for Other Purposes".

Constitution of Arkansas and the 14th Amendment as transmitted from the 1st Amendment of the Constitution of the United States.

"5. They compel a person to bear witness against himself.

"6. They are *ex post facto* in their nature.

"7. They interfere with plaintiffs and other Negro citizens of Arkansas, similarly situated, in their right to worship God under the dictates of their own conscience.

"8. They permit the General Assembly of Arkansas to perform executive functions contrary to Article IV of the Constitution of Arkansas.

"9. They violate Article V, Section 10 of the Constitution of Arkansas.

"10. They authorize unlawful search and seizure contrary to Article II, Section 15 of the Constitution of Arkansas.

"11. They are too vague and indefinite for enforcement, and the alleged 'emergency' for inclusion of the Emergency Clause, does not exist."

1. These points, as contained in appellants' brief are:

"1. The Acts constitute class legislation based on the classification of race and color.

"2. They fix no limits upon the power and authority of the State Sovereignty Commission.

"3. They are not justified by any proper or lawful governmental objective, nor to achieve same.

"4. They deprive plaintiffs and other Negro citizens of Arkansas, similarly situated because of their race and color, of their right to Freedom of Speech and Assembly; and, their right of petition secured to them by Article 11, Section 4 of the

Sections 1 to 6 concern the creation of the Commission and the persons who are designated or permitted to be appointed as members of the Commission. Sections 7, 8, and 9 of the Act authorize the employment of personnel, payment of expenses, etc. Section 10 lists the powers and duties of the Commission; and portions of this section will be discussed in Topic III *infra*. Sections 11, 12, 13, 14, and 15 give powers of inspection and examination to the Commission and authorize hearings. Section 11 will be discussed in Topic II *infra*. Section 16 requires cooperation by other officers and employees of the State with the Commission; Section 17 is the separability clause; and Section 18 is the emergency clause. Some of the eleven points relied on by plaintiffs do not apply to Act No. 83, so we list our own topic headings.

I. *The Attack On Sections 2 And 3 Of The Act No. 83.* In all there are twelve members of the Commission: the Governor, Attorney General, Lieutenant Governor, and Speaker of the House of Representatives, are ex-officio members; and the other eight members consist of three citizens appointed by the Governor from geographical areas, two State Senators appointed by the President of the Senate, and three Representatives appointed by the Speaker of the House. This point challenges the right of members of the General Assembly to be named to the State Sovereignty Commission. Article V, Section 10 of the Arkansas Constitution says: "No Senator or Representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this State".

[*Application of State Constitution*]

In *Fulkerson v. Refunding Board*, 201 Ark. 957, 147 S.W.2d 980, we held that the members of the General Assembly could not serve as members of the Refunding Board created by the Act No. 4 of the 1941 Legislature; and we are unable to distinguish the holding in that case from the point here presented. The late and beloved Mr. Justice Frank G. Smith wrote the opinion in *Fulkerson v. Refunding Board*; and in his usual clear and fully explanatory manner he said:

"It is alleged that § 1 of Act No. 4 violates §§ 1 and 2, of Art. 4, and § 10 of Art. 5, and § 6 of Art. 18, of the Constitution, and is, therefore, invalid, because it provides that

three senators and five representatives shall be members of the Refunding Board.

"We are of the opinion that this objection is well taken, and that these members of the General Assembly are not eligible to serve as members of the board, because of their membership in the General Assembly which enacted the legislation.

"It is thought to be contrary to both the spirit and the letter of the Constitution for the General Assembly to create an office or board or other state agency, and then to fill the place thus created with one or more of its own members. The recent case of *Oates v. Rogers*, 201 Ark. 335, 144 S.W.2d 457, announces the policy of the Constitution and laws of this State to separate and keep distinct the departments of government.

"Now, of course, the General Assembly has the right to appoint such committees or commissions, to be composed, in part or wholly, of its own members, to make investigation and report upon any matter related to the discharge of their legislative duties. But the discharge and performance of the details of Act No. 4 is not a legislative matter. It was the sole province of the General Assembly to enact the law. It is the duty of the Judicial department to construe it, and it will be the duty of the executive department to enforce it; and we think it is beyond the power of the General Assembly to confer executive powers upon its members, and we think the appointment of members of the General Assembly to membership on the Refunding Board is in contravention of the spirit, if not the letter, of the sections of the Constitution above referred to. The General Assembly has the power to name the persons, whether officials or not, who shall execute the laws it may pass. For instance, it was held in the case of *Cox v. State*, 72 Ark. 94, 78 S.W. 756, 105 Am.St.Rep. 17, that the act providing that the members of the Board of State Capitol Commissioners should be elected by the two Houses of the Legislature is constitutional. But it is a different matter to say that the Legislature might create a capitol or other commission, and thereafter elect its members to the places created."

[Legislators Must Be Removed]

The language of § 2 of Act No. 83, here involved, is so similar to that of § 1 of Act 4 of 1941, as regards the members of the General Assembly, that no sound distinction can be made between the decided case and the case at bar. The Governor, the Attorney General, and the Lieutenant Governor are eligible to serve as ex-officio members of the Commission because Art. 6 § 1 of the Constitution, as amended by Amendment No. 6, provides that these officials are executive officers; and the inhibition mentioned in Art. 5 § 10 of the Constitution applies to legislative officers. So the effect of our holding on this point is that there must be removed from the Commission two Senators and three Representatives appointed under §§ 2(c) and 2(d) of Act No. 83, and the Speaker of the House, as appointed under § 2(a) of the Act. Thus, the Commission is left composed of the Governor, the Attorney General, and the Lieutenant Governor, as ex-officio officers, and the three citizens appointed by the Governor under § 2(b) of the Act.

II. The Attack On Section 11 Of Act No. 83.
This section reads in part as follows:

"SECTION 11. The members of the Commission and the duly authorized employees and representatives of the Commission when so directed by the Commission shall have the power and authority to examine, during the usual business hours of the day, all records, books, documents and other papers touching upon or concerning the matters and things about which the Commission is authorized to conduct an investigation, and the Commission shall have the power and authority to require all persons, firms, and corporations having such books, records, documents, and other papers in their possession or under their control, to produce the same within this State at such time and place as the Commission may designate, and to permit an inspection and examination thereof by members of said Commission or its authorized representatives and employees."

The quoted language brings us face to face with Art. 2 § 15 of the Arkansas Constitution, which reads in part: "The right of the people of this State to be secure in their persons, houses, papers, and effects against unreasonable searches

and seizures shall not be violated; . . ." We cannot put the stamp of approval on Section 11 of the Act No. 83, which would allow the Commission, or its members or representatives, without search warrants or judicial process, to conduct an examination of the records, books, documents, and other papers, of anyone, just as might be desired. The quoted language of § 11 literally allows the Commission, or its representatives, to go at will and examine all of the books, records, and papers of any person without notice, search warrant, or judicial process. While we are anxious to preserve the State's sovereignty, we must be just as anxious to preserve the constitutional safeguards of the citizens. The power here granted under § 11 is not like the visitatorial powers the State has over corporations (see *Hammond Packing Co. v. State*, 81 Ark. 519, 100 S.W. 407, 100 S.W. 1199); nor is the power like that which may be exercised by the State in its regulatory power over public utilities. Rather, here, we are dealing with the rights of citizens; and the constitutional guarantees are superior to the legislative enactments.

[Act 83, Section 11, Unconstitutional]

The Sovereignty Commission has ample power under § 12 of the Act No. 83 to initiate investigations and summon witnesses. It can apply to the Court for *subpoena duces tecum*; and, under § 13 of the Act, the Commission may apply to a court to enforce its desired process. As we understand §§ 12 and 13, the proper court may issue process and hear contempt matters on request of the Sovereignty Commission. As so understood, full judicial protection is accorded; and such is the orderly and constitutional manner of procedure. So we strike § 11 of the Act No. 83 as being unconstitutional.

III. The Claim Of Racial Discrimination. The plaintiffs showed that they were Negro ministers, and claimed that the Act No. 83 interfered with their rights as such citizens. We find nothing in the Act to support such claim. Section 10(d) of the Act No. 83 refers to school integration, and Section 18 also refers to the integration decision.

That the decision in *Brown v. Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R.2d 1180, and the cases following it, have created a serious condition in the South was recognized by the United States Supreme

Court when it was stated that the lower Federal Courts would proceed as the facts in each situation justify. See *Brown v. Board of Education*, 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753. So the very nature of the decree in *Brown v. Board of Education* constitutes judicial recognition by the Supreme Court of the United States that some time will be required—how long none of us can tell—before the opinion of the Supreme Court of the United States in regard to integration in the southern schools can ever be carried into effect. The Legislature of Arkansas, both in § 10(d) and in § 18 of the Act No. 83, has also recognized the same serious situation. But the Act No. 83 is not a racial discrimination act: rather, it is an act to preserve the State's sovereignty against the gradual encroachments of the Federal Government. As early as 1943 the Legislature of Arkansas perceived that the Federal Government was gradually encroaching on the sovereignty of the States; and the Act No. 166 of 1943 was captioned: "An Act to Provide for the Participation by this State in Organized, Concerted Action of the Several States to Secure the Return to Them After the War of all Normal State Powers Which During the War May Be Exercised by the Federal Government, and to Prevent Further Future Encroachments by Federal Bureaus, Boards, and Commissions, Into the Field of Usual State Functions, by Imposing upon the Attorney General Certain Duties with Respect to Existing and Proposed Federal Legislation". The present Act No. 83 is a further step by the State of Arkansas to protect its sovereignty against the encroachments of the Federal Government. The administration of Act No. 83 may lead to matters that will require further court action; but we cannot, in this declaratory judgment proceeding, say that the entire Act is unconstitutional on its face. *Shuttlesworth v. Birmingham Board of Education*, 162 F.Supp. 372; affirmed by U.S. Supreme Court, — U.S. —, 3 L.Ed.2d 145, 79 S.Ct. —.

IV. *Conclusion As To The Act No. 83.* We have carefully studied all of appellants' attacks on the Act No. 83, and find none to possess merit except those already discussed. The Act has a separability clause; also it is remedial and is neither penal nor criminal: therefore, it is to be liberally construed to effectuate its purposes. For these and other reasons arising because of the rules of statutory construction, it is our duty to strike the invalid portions of the Act No. 83,

and allow the other portions to stand. *Cotham v. Coffman*, 111 Ark. 108, 163 S.W. 1183. Therefore, we strike § 11 from the Act; also we hold that members of the General Assembly cannot be members of the Commission. To those extents we modify the decree of the Chancery Court; and, as so modified, the decree is affirmed as regards the Act No. 83.

ACT NO. 85

When we come to Act No. 85, we have a vastly different situation. That Act is captioned: "An Act to Require Persons Engaged in Certain Activities to Register With and Make Periodic Reports to the State Sovereignty Commission; and for Other Purposes". The Act requires that all persons who collect any money for any of the purposes set forth in § 5 of the Act, register with the Commission and furnish the name and address of every person who makes a contribution. Failure of compliance would result in fine or imprisonment. Section 5 of the Act reads in part:

"SECTION 5. The provisions of this Act shall apply only to such persons who, by himself or through any agent or employee or other person in any manner whatsoever, directly or indirectly, solicits, collects, or receives contributions to be used in whole or in part to aid in the accomplishment of any of the following purposes:

"(a) The passage by the Congress of the United States of any proposed or pending legislation which is designed to limit or circumscribe in any manner the operation and control of school districts in Arkansas by the duly elected and qualified officers, directors, agents and employees of such school districts."

Thus the Arkansas Legislature has undertaken to require the registration with the State Sovereignty Commission of all persons who collect money to be used, in whole or in part, to influence the passage of certain legislation by the Congress of the United States. Can a State validly enact such a law to affect the national Congress? That is the question.

[Regulation of Lobbying Act]

The Congress of the United States, by its Act of August 2, 1946, enacted a law commonly referred to as "Regulation of Lobbying". See

U.S.C.A. Title 2 § 261 *et seq.* This Federal Act provides for certain information to be furnished to the Clerk of the House of Representatives of the United States concerning the sources of all contributions. The Federal Act says in part (Title 2 § 266 U.S.C.A.):

"The provisions of this chapter shall apply to any person . . . who . . . solicits, collects, or receives money . . . to aid in the accomplishment of any of the following purposes: "(a) The passage or defeat of any legislation by the Congress of the United States. "(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

This Act of the Congress was upheld in *U.S. v. Harris*,² 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808, so the Congress of the United States has acted in a field in which it has the power to act. It is clear that § 5(a) of the Arkansas Act No. 85 was designed to require some of the same information to be furnished the State Sovereignty Commission of Arkansas that the Act of the Congress of the United States requires to be furnished to the House of Representatives. In the division of State and Federal powers there are some fields of legislation concurrent to both governments; and in other fields of legislative action by the Federal Government within its powers necessarily precludes action by the State Government on the same matter. The holdings on this point are summarized most clearly in 11 Am. Jur. 871, "Constitutional Law" § 175:

"The principle is therefore fundamental that state laws must yield to acts of Congress

2. The Supreme Court of the United States said in that case:

"Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act—to maintain the integrity of a basic governmental process. See *Burroughs & Cannon v. U.S.*, 290 US 534, 545, 78 L.Ed 484, 489, 54 S.Ct. 287.

"Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection. And here Congress has used that power in a manner restricted to its appropriate end. We conclude that §§ 305 and 308, as applied to persons defined in § 307, do not offend the First Amendment."

within the sphere of its delegated power. It is very obvious that where Congress has under the Federal Constitution the right of exercising exclusive jurisdiction and puts forth its power to cover the field, state legislation ceases to have efficacy; for when Congress passes a law in that field of legislation common to both Federal and State governments, the act of Congress supersedes all inconsistent State legislation. Congress in regulating a matter within the concurrent field of legislation speaks for all of the people and all of the States, and it is immaterial that the public policy embodied in the congressional legislation overrules the policies theretofore adopted by any of the States with respect to the subject matter of such legislation."

[Holdings Summarized]

Furthermore, in 11 Am.Jur. 307, "Conflict of Laws" § 8, the holdings are summarized:

"The States, however, cannot invade a field which belongs exclusively to Congress. Likewise, where Congress has legislated upon a subject which is within its constitutional control and over which it has the right to assume exclusive jurisdiction and has manifested its intention to deal therewith in full, the authority of the States is necessarily excluded, and any State legislation on the subject is void. Moreover, the State has no right to interfere or, by way of complement to the legislation of congress, to prescribe additional regulations and what they deem auxiliary provisions for the same purpose."

The rules announced in the foregoing quotations are too well recognized to require further discussion. It is clear that the State of Arkansas has no power to enact § 5(a) of the Act No. 85 in the face of the said Federal statute. U.S.C.A. Title 2 § 261 *et seq.* So § 5(a) of the Act No. 85 must be declared void, as we now do.

[Act 85 Wholly Unconstitutional]

The next question is the effect of such holding on the entire Act No. 85. In considering Act No. 83, we could strike certain portions and still leave the remainder to be valid. But as regards Act No. 85 the situation is entirely different. The Act No. 85 contains no separability clause, as did Act No. 83. Furthermore

the Act No. 85 imposes penalties,³ and is therefore to be strictly construed for the protection of the citizen. *Hughes v. State*, 6 Ark. 131; *State v. International Harvester Co.*, 79 Ark. 517, 96 S.W. 119; *Fisher v. Clayton*, 221 Ark. 528, 254 S.W.2d 315; *Thompson v. Chadwick*,

221 Ark. 720, 255 S.W.2d 687. The purpose of the Act was to require the registration of those who would attempt to influence legislation. We cannot say that the Act No. 85 would have been enacted without § 5(a) being a part thereof. We therefore hold that since 85(a) is void, the entire Act No. § 5 must fall.

It therefore follows that so much of the decree of the Chancery Court as held the Act No. 85 to be valid should be and the same is hereby reversed and Act No. 85 is held to be void.

3. Section 8 of Act 85 reads:

"Any person who violates any of the provisions of this act shall, upon conviction, be guilty of a misdemeanor and shall be punished by a fine or not more than \$5000.00 or imprisonment for not more than twelve (12) months, or by both such fine and imprisonment."

CRIMINAL LAW

Indians—California

Fred M. DICKSON, Warden of the California State Prison at San Quentin, California *v.* **Rayna Tom CARMEN**.

United States Court of Appeals, Ninth Circuit, September 29, 1959, 270 F.2d 809.

SUMMARY: After several unsuccessful attempts to upset a California state court conviction for murder, an Indian prisoner made application for habeas corpus to a federal district court. The court ordered him discharged from custody, holding that: the federal Ten Major Crimes Act applies to offenses committed on Indian allotments in trust (the crime in question having been so committed); petitioner and his Indian victim had not been "emancipated" by congressional action; a 1953 congressional grant to California of jurisdiction over Indians within the state was inapplicable to the 1950 crime involved in this case; and facts outside the trial record could properly be considered in such habeas corpus proceeding in deciding that the state court lacked jurisdiction. 165 F.Supp. 942, 4 Race Rel. L. Rep. 313 (N.D. Calif. 1958). On appeal, the Court of Appeals for the Ninth Circuit affirmed the judgment, endorsing the opinion of the district court.

ELECTIONS

Registration—Louisiana

Mrs. Margaret M. LARCHE, et al., *v.* **John A. HANNAH**, et al.

J. A. H. SLAWSON, et al., *v.* **John A. HANNAH**

United States District Court, Western District, Louisiana, 177 F.Supp. 816

SUMMARY: On June 10, 1959, the United States Civil Rights Commission announced plans to conduct hearings at Shreveport, Louisiana, on the alleged deprivation of voting rights of certain Louisiana citizens. Arrangements were made for the hearings to be held on July 13, and subpoenas for several Louisiana parish registrars and their records were served. On July 9, several of those named in the subpoenas sought and obtained a temporary restraining

order against the holding of the hearing. A three-judge court was ordered convened to hear the constitutional issues raised. Attorneys for the Civil Rights Commission then asked for a bond to indemnify the commission members for expenses. This was denied. The three-judge court met on August 7 and the question of the validity of the act setting up the commission and of certain of the commission's regulations was argued. Subsequently, the court, on October 7, upheld the creating act as constitutional, but found nothing in the act authorizing the commission's refusal to inform the persons subpoenaed of the nature, cause, and source of the accusations made against them, as well as to refuse cross-examination and confrontation. One judge dissented. An injunction was issued accordingly. Reproduced below are the temporary restraining orders and the opinion and order of October 7.

Opinion on Restraining Order, July 12, 1959

We are called upon here to pass tentatively upon one of the burning issues of our time—the propriety and validity of the Rules and Proceedings of the Civil Rights Commission, as established by Congress in September, 1957.¹

That Commission now proposes to hold a hearing, in the Federal Court room at Shreveport, Louisiana, on July 13, 1959, to investigate purported violations of the civil voting rights of some 67 persons, who are said to have filed sworn complaints with the Commission. Pursuant to, and in implementation of, its plans, the Commission has caused subpoenas, and subpoenas duces tecum, to be served upon the plaintiffs in these suits, commanding them to be present and give testimony at the hearing, and requiring the 16 Registrars of Voters, who are plaintiffs² in Civil Action No. 7479, to bring with them, for inspection and copying by the Commission, a large number of records from their offices.

These suits, brought against the members of the Commission, and the Commission itself, were filed on July 10, 1959, and are addressed to the equitable powers of this Court.³ They seek to stay the effectiveness of the Commission's subpoenas and subpoenas duces tecum, and to restrain and enjoin the conduct of the proposed hearing itself,⁴ which, plaintiffs aver,

under the Rules of Procedure adopted by the Commission, would violate their fundamental constitutional rights and cause them immediate and irreparable damage. Moreover, praying that a three-judge court⁵ be convened for that purpose, the Registrar-plaintiffs ask that the Act creating the Commission be declared⁶ violative of the Federal Constitution, and thus unenforceable.

[Served with Subpoenas]

Detailing their complaints, supported by sworn affidavits and exhibits attached, (and here briefly paraphrased), the Registrar-Plaintiffs, in Civil Action No. 7479, allege that between June 29, 1959, and July 6, 1959, each of them were served with subpoenas and subpoenas duces tecum, issued by the Chairman of the Commission, commanding them to appear and testify before the Commission on July 13, 1959, and to bring their records with them; that they have not been informed of the nature of the complaint or complaints against them, nor have they been assured that they will be confronted with the complaining witnesses; that the Commission repeatedly has informed the Attorney General of Louisiana, verbally and in writing,⁷ that it would not, under any circumstances, furnish plaintiffs with, or permit them to examine the written complaints filed against them, nor would it divulge the name or names of the secret complainants, all of which is arbitrary and unreasonable, and in violation of plaintiffs' fundamental rights.

They further aver that they, at all times, have complied with the laws of the State of Louisiana,

1. Public Law 85-315, 71 Stat. 634, 42 U.S.C.A. § 1975a-e.

2. These plaintiffs are the duly appointed and constituted Registrars of Voters in the Louisiana Parishes (counties) of Morehouse, Ouachita, Webster, Bossier, Claiborne, Bienville, DeSoto, East Carroll, Madison, Jackson, Red River, Caldwell, Caddo, East Feliciana, West Feliciana, and Washington, all but the last three of which are located in the northern part of the State.

3. Also alleging jurisdiction in this Court based upon Federal questions, 28 U.S.C.A. § 1331, and Diverse Citizenship, 28 U.S.C.A. § 1332.

4. Pursuant to 28 U.S.C.A. § 2284(3).

5. 28 U.S.C.A. §§ 2282, 2284.

6. Under the Declaratory Judgment Statute, 28 U.S.C.A. § 2201, et seq.

7. The writings are attached to the complaint.

but that the subpoenas served upon them would require them to violate such laws,⁸ in that the Registrars' records legally may not be removed from their offices, except "upon an order of a competent court", criminal penalties being provided for violations of these statutes;⁹ and that the Commission is not a "competent court". Hence, they say, to comply with the subpoenas, they would be violating the State laws, and subjecting themselves to the penalties thus provided.

These plaintiffs further allege that, attached to the subpoenas served upon them, was a mimeographed document entitled "Rules of Procedure for hearings of the Commission on Civil Rights" in which appears the following: "(1) Interrogation of witnesses shall be conducted only by members of the Commission or by authorized staff personnel"; and that thereby plaintiffs are deprived of their constitutional right to cross-examine witnesses who may testify against them. They contend that the Commission and its members thus are acting in an *ultra vires* manner in 1) attempting to force plaintiffs to testify at the proposed hearing without first advising them of the nature of the complaint or complaints existing; 2) without allowing plaintiffs to be confronted by the complaining witnesses; 3) not

allowing plaintiffs to have counsel empowered to fully represent their interests in such hearing; 4) not allowing cross-examination of the complaining witnesses; and 5) causing irreparable damage to plaintiffs by requiring them to violate the Laws of Louisiana, which would subject them to serious criminal penalties. In their brief, they also urge, as a direct incident of the hearing itself, with unnamed and unknown witnesses testifying against them, not subject to cross-examination by plaintiffs' counsel, that they will be wrongfully accused of violations of both Federal¹⁰ and State¹¹ laws, without adequate opportunity to disprove such accusations, and thus be held up, by the Commission's actions, to public opprobrium and scorn, all to their irreparable injury and damage.

[Subject to Procedure Act]

They further contend that the Commission, being an agency of the Executive branch of the Federal Government, is subject to the pro-

8. L.S.A.-R.S. 18:169. "Control and custody of registration books and other records.

"The books of registration, together with all the records, registry stub books, and all other books and paraphernalia used for the conduct of the registrar's office, shall at all times be kept under the control of and in the custody of the registrar at his principal office. They shall not be removed therefrom for any purpose except upon an order of a competent court, except the parish register and registration certificate books when these are necessary for the registration of voters, when registration is permitted at places other than at the central office.

- L.S.A.-R.S. 18:251. "Custody of records.

"Except as otherwise provided in this Title, the registers, records, files, books, and paraphernalia used for the conduct of the registrar's office shall at all times be kept under the control and in the custody of the registrar at his principal office and shall be removed therefrom only on order of a competent court. Added Acts 1952, No. 415, § 2."

9. L.S.A.-R.S. 18:221. "Violations generally; successive offenses.

"No person shall violate any provision of this Chapter for which no penalty is specifically provided, or willfully fail or refuse to perform an act or duty required under this Chapter.

"Whoever violates this Section shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned for not less than ninety days nor more than six months. The penalty shall be doubled for the second or any succeeding offense."

10. 18 U.S.C.A. § 242. "Deprivation of rights under color of law

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

- 42 U.S.C.A. § 1983. "Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress. R.S. § 1979."

11. L.S.A.-R.S. 14:134. "Malfeasance in office

"Malfeasance in office is committed when any public officer or public employee shall:

"(1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or

"(2) Intentionally perform any such duty in an unlawful manner; or

"(3) Knowingly permit any other public officer or public employee, under his authority, to intentionally refuse or fail to perform any duty lawfully required of him, or to perform any such duty in an unlawful manner.

"Whoever commits the crime of malfeasance in office shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both."

And see L.S.A.-R.S. 18:221, fn. 9.

visions of the Administrative Procedure Act,¹² and, as such, is required to state explicitly the charges against plaintiffs, to permit them to be confronted with the witnesses against them, and to allow their counsel fully to cross-examine such witnesses. Accordingly, these plaintiffs seek the relief hereinabove outlined.

In general, the plaintiffs in Civil Action No. 7480, who are individual citizens of Louisiana, make the same allegations and contentions as those in No. 7479, except that they have not been called upon to produce any official records. They do not challenge the constitutionality of the Act creating the Commission, but otherwise their prayer for relief is substantially similar to that in No. 7479.

Several days prior to July 10, 1959, we were advised by plaintiffs' counsel that they would file these suits on the date indicated. While, as a general rule, applications for temporary restraining orders are considered *ex parte*, solely on the face of the verified complaint and any attached documents, because of the national importance of the matters involved, we immediately notified counsel for the Commission, and its Vice-Chairman, Honorable Robert G. Storey (a personal friend of the Court's, of long standing) of our information, and invited them to be present for a hearing on the applications. The suits were filed at 1:30 P. M. on July 10, and at 2:00 P. M., in open Court, these gentlemen, and counsel for plaintiffs, being present, we convened Court, but immediately recessed in order to give the Commission's representatives opportunity to study the complaints and briefs filed by plaintiffs. At 3:30 P. M., we reconvened and heard oral arguments, from both sides, until 5:20 P. M., at which time the matter of the restraining orders was submitted for decision on the oral arguments and briefs filed by the proponents and opponents of the applications. We have considered the able arguments, studied the respective briefs and authorities cited, and now proceed to our ruling. Necessarily, because of the time element, we have been compelled, under great pressure, to consider the questions rather hastily; and we reserve the right to alter our views, if necessary, after more mature deliberation.

The Court has jurisdiction. 28 U.S.C.A. §§ 1331, 1332, 2201, 2282, 2284. *Jones v. Securities Commission*, 298 U.S. 1, 56 S.Ct. 654, 80 L.Ed. 1015.

12. 5 U.S.C.A. §§ 1001, et seq.

[Subject to Louisiana Penalty]

We are not strongly impressed with the Registrar-plaintiffs' contention that the subpoenas duces tecum, if complied with, would subject them to criminal penalties under Louisiana law. Literally, of course, if they directly complied without more, they are correct in their understanding of the State law. Practically, however, another and different aspect is presented, for under the Civil Rights Commission Act they can refuse to produce the records, without penalties of any kind, and the only recourse the Commission would have would be to request the Attorney General of the United States to apply to this Court, under 42 U.S.C.A. § 1975d(g)¹³ for an order requiring their production. Plaintiffs then would be protected against State prosecution by the very terms of LSA-R.S. 18:236,¹⁴ as well as by LSA-R.S. 18:169 (see fn. 8), for this

13. "Aid of courts in enforcing subpoenas

"(g) In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof. Pub.L. 85-315, Part I, § 105, Sept. 9, 1957, 71 Stat. 636."

14. "§ 236. Alteration, defacing, destruction or removal of records; penalty

"No registrar, deputy, clerk, or employee of any registrar, or any person having, or having been given access to, or right of inspection, copying or photographing of any book, card, record, or other document pertaining to the registration of voters, shall illegally or improperly alter, add to, deface, destroy, or remove same from the custody of the registrar.

"Whoever violates this Section shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned for not less than sixty days nor more than two years. However, nothing in this Section prevents a competent court from requiring, by proper order, the production by the registrar in court, in any proceeding pending therein, of any document, book, card, or record necessary and material, in the opinion of the court, to the determination of the proceeding; such documents do not become permanent records of the court, but shall be returned to the custody of the registrar immediately after inspection by the court. The court may require a photostatic copy thereof to be placed in the record. Added Acts 1952, No. 415, § 2."

Court clearly is a "competent court", within the meaning of those Statutes.

Likewise, plaintiffs would suffer no immediate federal penalties under the Act for refusal either to appear or to testify, but would be subject to an enforcement order from this Court, which would see to it that their constitutional rights against self-incrimination are adequately protected. Moreover, under the Act, since their counsel are entitled to be present, they could be advised, at each step of the proceedings, whether to claim the protection of the Fifth Amendment, even though, in this day, the general public has come to consider such a claim as tantamount to a plea of guilty, particularly in response to "loaded" questions.

[Grounds Well Taken]

We are strongly of the opinion, however, that plaintiffs' remaining grounds for immediate relief are well taken:

First, it appears rather clear, at this juncture, that the Civil Rights Commission is an "agency" of the Executive branch of the United States, within the meaning of that term as defined at 5 U.S.C.A. § 1001(a).¹⁵ See also 42 U.S.C.A. § 1975(a).¹⁶ It performs quasi-judicial functions in its hearings, its fact findings, its studies of "legal developments constituting a denial of equal protection of the laws under the Constitution", and its appraisal of "the laws and policies of the Federal Government" in the same respect.¹⁷ It "adjudicates" by its rulings upon the

admissibility of evidence at its hearings and by its determinations of what is or is not the truth in matters before it. Thus we think that the Commission is subject to the provisions of section 4 of the Administrative Procedure Act,¹⁸ which requires, among other things that persons affected by agency action "... shall be timely informed of the matters of fact and law asserted." Here that would encompass the *nature* of the charges filed against plaintiffs, as well as the matters of fact and law wherein the complainants' voting rights allegedly have been violated. The Commission also is subject to section 6 which would require it to grant plaintiffs the right to conduct such cross-examination as may be required for a full and true disclosure of the facts.¹⁹ This, by its Rules, the Commission refuses to do, and in so doing, regardless of its well intentioned motives, it violates the terms of that Act. Plaintiffs are entitled, therefore, to protection against these rules, which would deprive them of their plain rights under the Act.

Second, while the statute creating the Commission inferentially permits it to adopt reasonable Rules, 42 U.S.C.A. § 1975(b), there is no provision whatsoever in the law to effect that such Rules may include those here complained

States are being deprived of their right to vote and have that vote counted by reasons of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

"(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and

"(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

"(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from September 9, 1957."

18. 5 U.S.C.A. § 1004. "Adjudications."

"(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. ..." (Emphasis supplied.)

19. 5 U.S.C.A. § 1006. "Hearings, presiding officers; powers and duties; burden of proof; evidence; record as basis for decision."

"(c) ... Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. ..."

15. "(a) 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States, other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 1002 of this title, there shall be excluded from the operation of this chapter (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, ..."

16. § 1975. *Commission on Civil Rights—Establishment*
"(a) There is created in the executive branch of the Government a Commission on Civil Rights (hereinafter called the 'Commission')." (Emphasis supplied.)

17. 42 U.S.C.A. § 1975c. "Duties; reports; termination"
"(a) The Commission shall—
"(1) investigate allegations in writing under oath or affirmation that certain citizens of the United

of, which plainly violate plaintiffs' basic rights to know in advance with what they are charged, to be confronted by the witnesses against them,²⁰ and to cross-examine their accusers. We cannot believe that Congress intended to deny these fundamental rights to anyone, and because of such belief it is our opinion that these Rules of the Commission are *ultra vires* and unenforceable. Therefore, plaintiffs are entitled to immediate relief against them.

[Must Be Advised]

Third, entirely aside from the statutory questions just discussed, the Courts of the United States, and their Anglo-Saxon predecessors, always have seen to it that, in hearings or trials of all kinds, persons accused of violating laws must be adequately advised of the charges against them, confronted by their accusers, and permitted to search for the truth through cross-examination. In *Jones v. Securities Commission*, 298 U.S. 1, 27, 57 S.Ct. 654, 80 L.Ed. 1015, the Supreme Court said:

"... 'A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end.'

"The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. . . .

"The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. *An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific*

statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light. . . .' (Emphasis supplied.)

In *Morgan, et al. v. United States, et al.*, 304 U.S. 1, 14, 20, 25, 58 S.Ct. 773, 82 L.Ed. 1129, involving an administrative hearing, the Court said:

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' . . .

"The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. . . .

"Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. . . ."

In the most recent decision on this subject, handed down by the Supreme Court on June 29, 1959, *Greene v. McElroy*, No. 180, October 1958 Term, _____ U. S. _____, _____ S.Ct. _____, _____ L.Ed. _____, 29 L.W. 4528, 4534, 4538, and speaking through Chief Justice Warren, the following language is found:

20. 42 U.S.C.A. § 1975a(g) inferentially authorizes the Commission to sit in executive or closed session. Apparently pursuant to this, the Commission's Rules 2(e) and (g) were adopted. They do not guarantee, or apparently even permit, the person accused at such an executive session to be present to confront the witness or witnesses against him.

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g., *Mattox v. United States*, 156 U.S. 237, 242-244; *Kirby v. United States*, 174 U.S. 47; *Motes v. United States*, 178 U.S. 458, 474; *In re Oliver*, 333 U.S. 257, 273, but also in all types of cases where administrative and regulatory action were under scrutiny. E.g., *Southern R. Co. v. Virginia*, 290 U.S. 190; *Ohio Bell Telephone Co. v. Commission*, 301 U.S. 292; *Morgan v. United States*, 304 U.S. 1, 19; *Carter v. Kubler*, 320 U.S. 243; *Reilly v. Pinkus*, 338 U.S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-fascist Committee v. McGrath*, 341 U.S. 168-169 (concurring opinion).

"Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 *Wigmore on Evidence* (3d ed. 1940) § 1367:

"For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination,

and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

"Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Dismuke v. United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 229-300; *American Power Co. v. Securities and Exchange Comm'n*, 329 U.S. 90, 107-108; *Hannegan v. Esquire*, 327 U.S. 146, 156; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49. Cf. *Anniston Mfg. Co. v. Davis*, 301 U.S. 337; *United States v. Rumely*, 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication and without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition."

[Reasons for Relief Sustained]

These authorities, therefore, clearly establish additional reasons why plaintiffs should be granted immediate relief.

Fourth, there is every reason to believe, considering that the Commission has announced its receipt of complaints from some 67 persons, that those persons will testify that plaintiffs have violated either the State or Federal laws, or both. Plaintiffs thus will be condemned out of the mouths of these witnesses, and plaintiffs' testimony alone, without having the right to cross-examine and thereby to test the truth of such assertions, may not be adequate to meet or overcome the charges, thus permitting plaintiffs to be stigmatized and held up, before the eyes of the nation to opprobrium and scorn. Moreover, not knowing in advance the exact nature of the charges to be made against them, some of the plaintiffs, whose official domiciles are at varying distances up to 250 miles from Shreveport, may not be able physically to obtain the presence of witnesses of their own, who might negative or disprove the claims of the complaining witnesses, especially since the Com-

mission has announced that its hearing will last only one day.

These are further solid reasons, showing possible or probable irreparable injury to plaintiffs, which justify their being granted immediate relief.

[Other Bases]

Fifth, and finally, plaintiffs raise very serious questions regarding the validity—the constitutionality—of the very Act which created the Commission. We do not intimate here any opinion as to the constitutionality of the Statute, for that is a matter to be decided by the three-judge court to be convened by the Chief Judge of this Circuit. However, the seriousness of the attack must be noted, in considering whether a temporary restraining order should be issued, to stay the effectiveness of the Statute until its validity *vel non* can be determined by the three-judge court after hearing on plaintiffs' application for an interlocutory injunction. See *Ohio Oil Co. v. Conway*, 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972, where the Supreme Court stated, in a *per curiam* opinion:

"The application for an interlocutory injunction was submitted on ex parte affidavits which are harmonious in some particulars and contradictory in other. The affidavits, especially those for the defendant, are open to the criticism that on some points mere conclusions are given instead of primary facts. But enough appears to make it plain that there is a real dispute over material questions of fact which can not be satisfactorily resolved upon the present affidavits and yet must be resolved before the constitutional validity of the amendatory statute can be determined.

"Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love v. Atchison, Topeka & Santa Fe R. Co.*, 185 Fed. 321, 331-332."

In *Crockett v. Hortman*, 101 F.Supp. 111, 115, at page 115, Judge Wright, of the Eastern Dis-

trict of Louisiana, dealing with the constitutionality of a State statute, said:

"Where as here the questions presented by an application for a temporary injunction are grave, and the injury to the moving parties will be certain and irreparable if the application be denied and the final decree be in their favor, while if the injunction be granted the injury to opposing parties, even if the final decree be in their favor, will be inconsiderable, the injunction should be granted. *Ohio Oil Co. v. Conway*, 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972.

"The determination of the grave constitutional issues presented in this case should not be decided without a trial on the merits, *Polk Co. v. Glover*, 305 U.S. 5, 59 S.Ct. 15, 83 L.Ed. 6, and a temporary injunction should be issued in order that the status quo may be preserved until that time."

To the same effect, see also *Burton, et al. v. Matanuska Valley Lines, Inc.*, 244 F.2d 647.

This, then, is another ground upon which plaintiffs are entitled to the immediate relief they seek.

For these reasons,²¹ the applications for temporary restraining orders will be GRANTED.

TEMPORARY RESTRAINING ORDER

Upon the verified complaint heretofore filed herein, and upon motion by complainants for a preliminary injunction and for a temporary restraining order against defendants, it appearing to this Court that the complaint seeks a judgment and enjoining the defendants,

John A. Hannah, whom complainants allege to be a resident of East Lansing, Michigan;

Robert G. Storey, whom complainants allege to be a resident of Dallas, Texas;

John S. Battle, whom complainants allege to be a resident of Charlottesville, Virginia;

Rev. Theodore S. Hesburgh, whom complainants allege to be a resident of South Bend, Indiana;

Doyle E. Carlton, whom complainants al-

21. Nothing that we have said, in ruling upon these cases, is intended in any way to reflect upon the Commission, its members or its staff, all of whom, we are sure, are honorable gentlemen.

lege to be a resident of Tampa, Florida; George M. Johnson, whom complainants allege to be a resident of the State of California, presently residing in Washington, D. C.,

individually and in their capacity as members of the Commission on Civil Rights created by Public Law 85-315, 85th Congress, 71 Stat. 634; U. S. C. A. 42:1975 et seq., their agents, servants, employees and attorneys from enforcing, attempting to enforce, proceeding under, or holding any hearings pursuant to Public Law 85-315, 85th Congress, 71 Stat. 634; U. S. C. A. 42:1975 et seq., and the rules of procedure promulgated pursuant thereto as concerns complainants herein and others similarly situated upon the ground, among others, that the aforesaid statute is unconstitutional, this Court finds that irreparable damage will be caused to complainants unless a temporary restraining order is issued against the said defendants, and all of them, for the reasons stated in a written ruling this day filed, and made part hereof by reference.

NOW, THEREFORE it is ordered, adjudged and decreed that the said,

John A Hannah, whom complainants allege to be a resident of East Lansing, Michigan;

Robert G. Storey, whom complainants allege to be a resident of Dallas, Texas;

John S. Battle, whom complainants allege

to be a resident of Charlottesville, Virginia; Rev. Theodore S. Hesburgh, whom complainants allege to be a resident of South Bend, Indiana;

Doyle E. Carlton, whom complainants allege to be a resident of Tampa, Florida; George M. Johnson, whom complainants allege to be a resident of the State of California, presently residing in Washington, D. C.,

individually and in their capacity as members of the Commission on Civil Rights, created by Public Law 85-315, 85th Congress, 71 Stat. 634; U. S. C. A. 42:1975 et seq., together with their agents, servants, employees and attorneys, be restrained temporarily and enjoined from proceeding under or holding any hearings pursuant to said Public Law, as concerns complainants herein and others similarly situated, and particularly as regards the hearing scheduled by the Commission on Civil Rights fixed for July 13, 1959, at Shreveport, Louisiana, until the hearing and determination of the motion for a preliminary or interlocutory injunction by a full Court of three judges, to be held, as hereinafter ordered, on July 22, 1959.

It is further ordered that a rule nisi issue herein, directed to said parties hereby restrained, commanding them to show cause, if any they can, at 9:30 a.m. July 22, 1959, at the Federal courtroom, 3rd floor, United States Post Office and Courthouse, Shreveport, Louisiana, why the preliminary or interlocutory injunction prayed for by plaintiffs, should not be granted.

Opinion of 3-Judge Court, October 7, 1959

HUNTER, JUDGE.

This case originated in the Shreveport Division of the Western District of Louisiana upon the filing of a complaint on July 10, 1959. Plaintiffs are registrars of voters in and for certain parishes in Louisiana.¹ The Commission on Civil Rights is a temporary agency of the United States, created by the Civil Rights Act of 1957, under Public Law 85-315, 85th Congress, U.S.C.A. 42:1975, et seq. The Commission scheduled a hearing for July 13, 1959, in Shreveport, Louisiana for the purpose of investigating allegations in writing (under oath or affirmation)

1. Hereinafter referred to as "Registrars".

that certain citizens were being deprived of their right to vote on account of race or color.²

2. Under Section 104(a) of that Act the Commission is empowered and directed to: "(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based; * * *

The Act also empowers the Commission, or any authorized subcommittee thereof, to hold such public hearings and act at such times and places as the Commission may deem advisable. Said Act also empowers the Commission to require the attendance and testimony of witnesses or the production of written or other matters.

These allegations accuse the registrars, through their officials acts, of having caused such deprivation, and summoned them to appear before the Commission. The subpoenas also required the registrars to produce for inspection various voting and registration records within their custody and control.

The suit is against the Commission and its members. Its declared object is to stay the effectiveness of the Commission subpoenas and subpoenas duces tecum, and to restrain and enjoin the conduct of the proposed hearing. The registrars insist they are entitled to this relief because the Commission is seeking to hold such hearing pursuant to rules of procedure which are ultra vires, and which deny to them traditional procedural safeguards. Moreover, the registrars assert that the rules of procedure adopted by the Commission violate their fundamental constitutional rights; and that the Act in its entirety is unconstitutional because it constitutes an unconstitutional delegation of power.³

[Complaints Detailed]

Detailing their complaints, supported by sworn affidavits, the registrars allege that they were served with subpoenas and subpoenas duces tecum issued by the Chairman of the Commission, commanding them to appear and testify before the Commission on July 13, 1959; that they have not been informed of the nature of the complaints against them, nor have they been assured that they will be confronted with the complaining witnesses; that the Commission repeatedly has informed the Attorney General of Louisiana that it would not, under any circumstances, furnish plaintiffs with, or permit them to examine, the written complaints filed against them, nor would it divulge the name or names of the secret complainants; that the rules under which the hearing is to be conducted specifically deny to registrars the right to cross-examine their accusers.⁴

3. Registrars also contend that the procedural provisions of the Administrative Procedure Act should be applied. We cannot agree. The A.P.A. prescribes in section 7 (5 U.S.C. 1006), specific hearing procedures with respect to two processes; in section 4 (5 U.S.C. 1003) with respect to "rule making", and in section 5 (5 U.S.C. 1004) with respect to "adjudications." The Act contains no hearing requirements except where rule making or adjudications are involved. The Civil Rights Commission is performing neither function here.

4. The truth of these facts is not contested.

On July 10, 1959 the case was heard by the Honorable Ben C. Dawkins, Jr., Chief Judge of the Western District of Louisiana. The matter was extensively argued and briefed. On July 12th Judge Dawkins granted a temporary restraining order and issued a rule on the Commission and its members to show cause why an interlocutory injunction should not issue. Judge Dawkins, in issuing the temporary restraining order, did not intimate any opinion as to the constitutionality of the statute itself.⁵ This three-judge court was convened to consider the constitutional attack.

The principal object and purpose of a three-judge federal court is to decide the constitutional validity of the Act of Congress sought to be enjoined. But where other issues are presented, as they are here, they too should be decided. The parties readily agree that this is so and that all issues, both constitutional and non-constitutional, are before this court.⁶

THE CONSTITUTIONALITY OF THE ACT ITSELF

Complainants seek a declaratory judgment to the effect that the Act is unconstitutional because it is not appropriate legislation. Manifestly, this position cannot be sustained.

The Constitution and pertinent decisions of the Supreme Court make clear that Congress may, pursuant to power conferred upon it by Article 1 of the Constitution, legislate to secure the right to vote in federal elections. That power has been found in Article 1, Section 4. *Ex Parte Siebold*, 100 U. S. 371, 383 (1879); *Ex Parte Yarbrough*, 110 U.S. 651, 660 (1884); *United States v. Mosley*, 238 U.S. 383 (1915). It has been found in Article 1, Section 8, Clause 18, *Ex Parte Yarbrough*, supra, at page 658. It has been found in Article 1, Section 2, *United States v. Classic*, 313 U.S. 299, 316 (1941). And, as the Supreme Court noted in the *Classic* case, supra, at page 315:

"... since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured

5. Judge Dawkins' opinion is made a part hereof by reference.

6. *California Water Supply Co. v. Redding*, 304 U.S. 252 (1938); *Davis v. Wallace*, 257 U.S. 478, 482 (1922); *Louisville and Nashville RR Co. v. Garrett*, 231 U.S. 298, 304 (1913).

against the action of individuals as well as of states."

It is equally clear that Congress may, pursuant to Section 2 of the 15th Amendment, legislate to prevent states and their officials from denying qualified persons the right to vote on account of race, color, or previous condition of servitude (*Guinn v. U.S.*, 238 U.S. 347 (1915); *In Re Wallace*, 170 F. Supp. 63 (1959)). Similarly, Congress may, pursuant to Section 5 of the 14th Amendment, legislate to prevent states and their officials from enacting or enforcing statutes which deny equal protection of the laws.

[Congressional Act Studied]

Since Congress may legislate pursuant to its constitutional powers, and since it may investigate those objects upon which it may legislate,⁷ and since it may delegate its investigative function,⁸ the issue of the constitutionality of the acts in creating the Commission rests solely on the question of whether the action of Congress was, in fact, an implementation of its constitutional powers. The stated purposes of the act, its fair reading, and its overwhelming legislative history are proof positive that Congress did create the Commission pursuant to its Article 1 power, as well as to its powers under Sections 5 and 2 of the 14th and 15th Amendments,⁹ respectively.

7. *Watkins v. U.S.*, 354 U.S. 178 (1957).

8. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501-510 (1943).

9. (A). From the report of the House of Representatives Judiciary Committee (Report No. 291, 85th Congress, First Session) accompanying the bill which became, in pertinent part, the Civil Rights Act of 1957, it is manifest that Congress was legislating pursuant to its Article 1 power. Thus, that portion of the report designated "General Statement" notes: The Provisions of the Bill H.R. 6127 are designed to achieve a more effective enforcement of the rights already guaranteed by the Constitution and laws of the United States. This is particularly true with regard to the right of franchise in federal matters. (At page 5.)

Similarly, the "General Statement" portion continues at page 6: With regard to the proposals involving the right to vote, the Federal Government has placed upon it by article 1, section 4, of the Constitution the authority to regulate the manner of conducting elections and that authority is further supplemented by the 14th and 15th amendments.

There is further evidence that throughout its deliberations Congress was conscious of its Article 1 power. A clear exercise of that power is illustrated by the enactment of the present subsection (b) of section 1971, Title 42. In authorizing the federal government to prevent certain types of conduct by individuals, its terms are carefully limited to federal elections. And, as the House Report, supra, makes

We are mindful of the arguments repeatedly appearing in the registrars' brief to the effect that the power granted to Congress to legislate is specifically limited by the Tenth Amendment. On its face the Tenth Amendment recognizes that certain powers are prohibited by the Constitution to the states, and therefore are not reserved to the states. One of these prohibitions is that no state may deny equal protection of its

clear (at pages 11-13), Congress rooted this provision in its Article 1 power.

Finally, the history of the terms of the Act which prescribe the duties of the Commission reveals that it was created pursuant to the Article 1 power. Section 104(a) directs that the Committee shall:

"(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted * * * (Emphasis supplied.)"

The underscored language was inserted by the House after the bill came out of Committee. Representative Hoffman, favoring the amendment, regarded its inclusion as crucial since Supreme Court had held it to be an integral part of the right to vote in *United States v. Classic*, supra, (103 Cong. Rec. App. 4716). Thus, the Commission was directed to investigate deprivations of an aspect of the right to vote which had been enunciated in a case which involved the Article 1 power of Congress.

(B). *The 14th Amendment.* In the House debates Congressman Celler referred to the Act (103 Cong. Rec. 16088) as " * * * clear implementation of the 14th and 15th amendments." Similarly, in the words of the House Report, supra, at page 6:

" * * * the 14th amendment operates to prevent any State from enacting or enforcing a law which would abridge the privilege and immunity of a United States citizen and denying such a person the equal protection of the laws. These two amendments expressly authorize Congress to enforce them by legislation. (Emphasis supplied.)"

" * * * the 14th and 15th amendments, both of which expressly confer upon the Congress the power to enforce them by appropriate regulations. (At page 13.) Above all, the terms of the Act itself which relate to the Commission on Civil Rights demonstrate conclusively that Congress relied in part upon its powers under section 5 of the Fourteenth Amendment. By section 104(a) the Commission is directed to:

(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and (emphasis supplied)

(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution. (Emphasis supplied.)

The inclusion by Congress of the underscored language manifests its reliance upon a concept found only in the 14th Amendment.

(C). *The 15th Amendment.* For example, the statement of Senator Bush at 103 Congressional Record, 13138: "That is the central purpose of this bill: to give meaning to the 15th amendment of the Constitution of the United States." See also the statement of Representative Celler in the House debates at 103 Congressional Record 16088.

laws (14th Amendment). Another is that no state may deny the right to vote on account of race, color, or previous condition of servitude (15th Amendment). Still another provision of the Constitution specifically gives to Congress the Power to legislate to secure the right of qualified electors to vote in federal elections (Article 1, Sec. 2). So, we have here involved the very powers which the Constitution says are not reserved to the states. The action here is not an invasion of state power merely because state voting and registration records are involved. The congressional power is complete in itself and may be exercised to its full extent. The investigation of alleged discriminatory practices is an appropriate step in the process of enforcing and protecting the right of qualified electors¹⁰ to vote. The Act very definitely constitutes appropriate legislation.

THE RULES OF THE COMMISSION

The remaining pertinent and serious questions presented may be thus stated:

- (1) Did Congress, in creating the Commission, specifically authorize it to adopt rules for investigations conducted under Section 104(a) (1) of the Act which would deprive parties investigated of their rights of confrontation and cross-examination and their right to be apprised of the charges against them?¹¹
10. Under our constitutional system the qualification of voters is a matter committed to the states, subject to federal constitutional restraints prohibiting discrimination on account of race, color, sex, etc. But it is also true that the right of citizens to cast ballots, and have them counted in congressional elections, in accordance with applicable state laws, is a right secured by the federal constitution, and this right, unlike those carried by the 14th and 15th amendments, is secured against the actions of individuals as well as states. Article 1, Section 2 of the Constitution, in its provisions for the election of members of the House of Representatives, and the Seventeenth Amendment, in its provision for the election of Senators, provide that officials will be chosen "by the people". Each provision goes on to state that "the Electors in each State shall have the qualifications requisite for Electors of the most numerous branches of the State Legislature." So, while the right of suffrage in federal elections is established in the Constitution, it is subject to the imposition of state standards which are not discriminatory (*Lassiter v. Northampton Election Bd.*, 360 U.S. 45, decided June 8, 1959).
11. Congress authorized the Commission to hold hearings (42 U.S.C. 1975(d)-(f)). Congress enumerated specific mandates with respect to certain less fundamental procedural aspects (42 U.S.C. 1975(a)).

- (2) If Congress did so authorize the Commission is such authorization constitutionally permissible?

A careful reading of the several opinions in *Groban*,¹² *Anonymous*,¹³ and *Greene*¹⁴ convinces us that, as applied to the circumstances of this case, a serious constitutional issue is presented as to whether or not the rules adopted by this Commission, which deprived these plaintiffs of the right of confrontation and cross-examination and the right to be apprised of the complaints against them, are violative of the Constitution. There is no talismanic formula which can be applied. Every term, the Supreme Court examines the particular circumstances of particular cases in order to apply generalities which no one disputes.

Under the rationale of *Greene*, concurred in by eight justices, a decision is not now required on the constitutionality of these deprivations. It is sufficient that we find there to be nothing in the Act which expressly authorizes or permits the Commission's refusal to inform persons, under investigation for criminal conduct, of the nature, cause and source of the accusations against them, and there is nothing in the act authorizing the Commission to deprive these persons of the right of confrontation and cross-examination.

Here, plaintiffs are being subjected to public opprobrium and scorn without fair and adequate opportunity to disprove the accusations against them. They are being subjected to the distinct likelihood of losing their jobs. They have been charged with, and are under investigation for, criminal conduct, and are to be ex-

Congress did not expressly authorize the Commission to deny to parties investigated the right of appraisal, confrontation, and cross-examination. The Commission assumed that they had the power to do so.

On their own, they adopted a rule denying to the parties investigated the right of cross-examination. The rule is 3(i) and reads as follows:

"Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel."

When informed that a hearing would be held to investigate charges against them, the registrars requested the right to see the accusations and affidavits filed against them. They also specifically requested the names of their accusers. The Commission refused both requests. The denial in each instance was by resolution (see *Stipulation*).

12. *In Re Groban*, 352 U.S. 330, 77 S. Ct. 510, decided February 25, 1957.
13. *Anonymous v. Baker*, 360 U.S. 287, June 15, 1959.
14. *Greene v. McElroy*, 360 U.S. 474, decided June 29, 1959.

ained in connection with offenses constituting federal and state crimes¹⁵ in a hearing which would completely fail to comport with traditional American ideas of fair play and would violate every element of natural justice.

[Called Under Rules]

The hearing sought to be restrained herein has been called pursuant to, and would be conducted in accordance with, rules which deny the right of confrontation. The registrars would be denied the right of cross-examination. They would be denied the right to be apprised of the identity of the person, or persons, making the charges against them, as well as the exact nature of the charge. These denials are the products of administrative decision not explicitly authorized by Congress. When we consider that this executive commission has been granted the right of subpoena to investigate allegations which, if true, would constitute the commission of crimes under state and federal law, and that it is further required to make a report of its findings to the Chief Executive whose duty it

is to enforce federal criminal laws,¹⁶ we can reach no other conclusion than to say that if ever the traditional procedural safeguards, spoken of in Greene, were required to protect appearers before a commission, then this is the instance. There, the Supreme Court, speaking through its Chief Justice, said:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e. g., *Mattox v. United States*, 156 U.S. 237, 242-244; *Kirby v. United States*, 174 U.S. 47; *Motes v. United States*, 178 U.S. 458, 474; *In re Oliver*, 333 U.S. 257, 273, but also in all types of cases where administrative and regulatory action were under scrutiny. E.g., *Southern R. Co. v. Virginia*, 290 U.S. 190; *Ohio Bell Telephone Co. v. Commission*, 301 U.S. 292; *Morgan v. United States*, 304 U.S. 1, 19; *Carter v. Kubler*, 320 U.S. 243; *Reilly v. Pinkus*, 338 U.S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-fascist Committee v. Mc-*

15. The Commission admittedly plans to hold the hearing to investigate written allegations that the registrars deprived certain citizens of their right to vote because of their color, race, religion, or national origin (see Affidavits of Registrars and Stipulation No. 5). Accordingly, it must be admitted that the registrars are being examined in connection with their alleged commission of federal and state crimes, as follows: to-wit: 18 U.S.C.A. 242

"Deprivation of rights under color of law"

"Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

LSA-R.S. 14:134

"Malfeasance in office"

"Malfeasance in office is committed when any public officer or public employee shall:

- "(1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or
- "(2) Intentionally perform any such duty in an unlawful manner; or
- "(3) Knowingly permit any other public officer or public employee, under his authority, to intentionally refuse or fail to perform any duty lawfully required of him, or to perform any such duty in an unlawful manner.

"Whoever commits the crime of malfeasance in office shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both."

16. 42 U.S.C. 1975 (c)(b) requires the Commission to submit to the President a final and comprehensive report of its findings. Since the Commission is required to make this report to the President, the Chief Executive Officer of the land, it is fair to presume that a prime purpose of this report is to secure execution and enforcement of the laws presently in effect.

Grath, 341 U.S. 168-169 (underscoring [italics] ours)

...

"Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Dismuke v. United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power Co. v. Securities and Exchange Comm'n*, 329 U.S. 90, 107-108; *Hannegan v. Esquire*, 327 U.S. 146, 156; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49; *Cf. Anniston Mfg. Co. v. Davis*, 301 U.S. 337; *United States v. Rumely*, 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication and without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition."

And Mr. Justice Douglas, concurring in *Peters v. Hobby*, 349 U.S. 331, says:

"It, therefore, becomes necessary for me to reach the constitutional issue.

"Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under Cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds, or by people who, though sincere, have poor facilities of observation and memory.

"Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and the

outer darkness, without the rudiments of a fair trial. The practice of using faceless informers has apparently spread through a vast domain. It is used not only to get rid of employees in the Government, but also employees who work for private firms having contracts with the Government. . . ."

The Supreme Court, in *Greene*, clearly and concisely charted a salutary and sensible course to be followed. Whether the procedures under the circumstances here are constitutionally permissible we do not decide. In accordance with the teachings of *Greene*, we decide only that in a hearing such as the one envisaged here, the Commission had no right to deny the accused Registrars the traditional rights of confrontation and cross-examination in the absence of explicit congressional authorization to do so.

In *Greene* the Supreme Court held these safeguards were not to be denied to one being investigated for alleged communistic associations and sympathies in the absence of explicit authorization from either the President or Congress. Surely, duly chosen state officials are entitled to the same protection, especially since no considerations of national security are involved. So is every citizen. In *Greene*, the government did not take the petitioner's job away from him, but he did lose his job as a result of a government finding to the effect that he was not a good security risk. If the Commission here finds the charges against the registrars are true, they are faced not only with public scorn and possible loss of their jobs, but also with probable indictment, arrest and prosecution.

[Implied Authority Considered]

We are impressed, but not persuaded, by the government's argument that the legislative history of the Act proves that the Commission acted at the implied direction of Congress in adopting the rules here under attack. This argument of implied direction cannot be sustained in the face of the following language from *Greene*:

"The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in

which they are denied the traditional procedural safeguards of confrontation and cross-examination."

"If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here."

"Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen professions without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. * * * Such decisions cannot be assumed by acquiescence or nonaction. * * * They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized. * * * but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

"Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Dismuke v. United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power Co. v. Securities and Exchange Comm'n*, 329 U.S. 90, 107-108; *Hannegan v. Esquire*, 327 U.S. 146, 156; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49; *C.F. Anniston Mfg. Co. v. Davis*, 301 U.S. 337; *United States v. Rumely*, 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most

explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition."

Moreover, even if we were to ignore *Greene*, which we have no right to do and certainly will not do, we would still reject the government's argument of implication. The rejection by Congress of more extensive rules is neither explicit nor implied authority to eliminate the fundamental safeguards under the circumstances here present. It is true that Congress refused to explicitly provide the safeguards, but it is equally true that there is nothing in the history of this legislation to show that Congress even considered writing into the Act any power of the Commission to do away with appraisal, confrontation, and cross-examination. The silence of Congress was apparently the product of thoughtful compromise. Some members of Congress positively wanted the fundamental safeguards spelled out, while others probably would have approved legislation specifically denying the accused these rights. Congress remained silent.

In *Greene* the Court specially found that the Defense Department had been authorized to fashion and apply an industrial clearance program but that the Department had not shown that either Congress or the President had explicitly authorized proceedings in which the accused was not afforded the safeguards of confrontation and cross-examination. In *Greene* the President, in general terms, had authorized the Department of Defense to create procedures to restrict the dissemination of classified information, and had apparently acquiesced in the elaborate program established by the Secretary of Defense which denied investigated parties of the rights of confrontation and cross-examination. The case for authorization there was stronger than here; e.g., in *Greene*, Part IV, § 2 of Executive Order 9835 specifically stated:

"* * * the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the

identity of the informants not be revealed
• • •

Justice Clark, dissenting, thought the authorization was specific:

"How the Court can say, despite these facts, that the President had not sufficiently authorized the program is beyond me, unless the Court means that it is necessary for the President to write out the Industrial Security Manual in his own hand."

The Supreme Court, by an 8-1 majority, rejected the authorization as being insufficient.¹⁷ We are not free to do otherwise here.

The conclusion is inevitable here that the burden is upon the government to show the "explicit action" by Congress authorizing the adoption of the rules which refuse to permit cross-examination, confrontation, and appraisal. In this case the government has made no attempt to point to any "explicit action" of authorization. Congress has made no such authorization, and absent such an explicit authorization, the rules in these particulars are clearly *ultra vires*.

THE EQUITIES

Proper voting practices are the cornerstone upon which our democratic balance is maintained. Discrimination upsets that balance. Moreover, discrimination clearly violates the Constitution. Steps designed to determine whether there has been discrimination are therefore of grave public interest and importance. When there are charges, as there are here, which

17. Equally as decisive on the issue of explicit authorization in areas of doubtful constitutionality is *Kent v. Dulles*, 357 U.S. 116. There, Congress had enacted legislation requiring every passport application to "contain a true recital of each and every matter of fact which may be required by any rules" of the Secretary of State, and that requirement had to be satisfied "before a passport is issued to any person." In this context, the Secretary asked for, and petitioners refused to file, the required affidavits stating whether they then were or ever had been members of the Communist party. Thereupon, the Secretary refused to further consider petitioners' application until such time as they filed the required affidavits. The scholars, the courts, the Chief Executive, and the Attorney General all agreed that the issuance of passports had for years been a "discretionary act" on the part of the State Department. The Supreme Court decided that in order for the Secretary to deny a passport to a Communist whose travel abroad would be inimical to our national security, Congress must so provide in explicit terms. The Court once again had construed very narrowly the delegated power to curtail or dilute substantial and fundamental rights.

state that by one means or another the vote is being denied to a qualified person, the public interest will be served by learning all the facts. Certainly, the surest way of finding out all the facts is to hear from everybody, and the surest test of a witness's veracity is his confrontation and cross-examination.

Government counsel seem to say in their briefs that their investigation is so very important that this Court should not hold that the traditional safeguards should be afforded the registrars. We in no way disagree with counsel for the government concerning the value they place on the precious right to vote. But search as we have, we find nothing inimical to the government's interest in giving to the registrars the rights they insist upon here. The ultimate goal of Congress in creating the Commission was to find out all the facts—the truth, not just possibly prejudiced opinion—so as to be able to safeguard the free exercise of the voting right, subject to the legitimate power of the state to prescribe non-discriminatory and fair voting qualifications. Often in cases of this nature the Court must balance between individual and governmental interests. Here, we examine the record for that purpose and find no conflict. No better procedure exists for finding out the truth than to give the accused notice of the case against him and full opportunity to meet it. Hearings so conducted generate a feeling, so vital in a popular government, that justice is being done.

[Irreparable Injury Faced]

We have dealt at length with the immediate and irreparable damage that would be caused the registrars by forcing them to proceed without giving them their basic and traditional rights. No good purpose would be served by reviewing that phase of the case. Suffice it to say that we stand on what we have said and we agree with Judge Dawkins' original opinion—that these registrars are faced with immediate and irreparable injury. What damage, what injury, will the Commission suffer by giving to these registrars their traditional safeguards of due process of law, and by affording them the tenets of natural justice? In our humble opinion, all the Commission will suffer is perhaps a little inconvenience. It may take them three days rather than one to get the facts. How best can they perform the major task of "finding out all the facts" than to give the persons investigated the basic legal safeguards. We have searched in vain through-

out the extensive briefs filed by the government in an effort to find out what irreparable damage, or what damage at all, could be done the Commission by prohibiting them from holding a hearing pursuant to these "ultra vires" rules and resolutions.

We do find in various parts of the government's briefs several statements or intimations as to damage. It was suggested that irreparable damage will be suffered because the Commission will expire in November. The recent action of Congress in extending the life of the Commission dispels this argument.

The government also suggests that if copies of the accusations and the names of the accusers were furnished the registrars it might result in the accusers being prosecuted for perjury. That is a strong argument—if one person makes a written allegation under oath that another has committed a crime and this oath turns out to be untrue, the public interest does not require that the government protect the perjurer. The government also argues that the Court should take judicial notice of the possible pressure to which persons making complaints in this field are subject under present circumstances. This Court does not know of a single instance where any such pressure has actually been brought. Some honest, sincere, and well-meaning people really believe this, but we are not going to assume (in the total absence of evidence) that the people of this State will be guilty of such a practice. Finally, the government argues that there is no point in telling these people what they did because they are the registrars and they *know* what they did. This contention assumes the registrars' guilt, an assumption which itself does violence to the American concept of justice—that all persons accused of crime are presumed to be innocent until proven guilty by competent evidence.

Insofar as the right to cross-examination is concerned, the government offers no reason why this should be denied. They merely say that they do not have to give it because congressional committees do not, and that Congress did not intend them to do it.

The Commission has authority to hold public hearings on vital public issues. Knowledge and understanding of every element of the problem will give greater clarity and perspective to one of the most difficult questions facing our country. Such a study, such an investigation, fairly con-

ducted, will tend to unite responsible people in a common effort to solve these problems. Investigation and hearings will bring into proper focus the areas of responsibility of the federal government and of the states under our constitutional system. Through greater public understanding, therefore, the Commission may chart a course of progress to guide us in the years ahead, but a fact finding investigation conducted as this one is proposed to be conducted can result only in misunderstanding, suspicion, hostility, and unneeded bitterness.

Natural justice would not require confrontation, appraisal, and cross-examination in every hearing of the Commission, but only in instances where, as here, the record makes it abundantly clear that those being investigated are accused and suspected of criminal conduct.

Believing as we do that the procedures and the rules of the Commission in the particulars heretofore discussed are ultra vires and threaten the registrars with immediate and irreparable damage, and believing further that the interests of the government, the public, and the Commission will best be served by the holding of a full and fair hearing wherein all accused of crimes are given a fair chance to develop all the facts, we have but one course to take—that is to dismiss the government's motion for summary judgment and grant the prayer for an injunction, in accordance with this opinion.

IT IS SO ORDERED on this the 6th day of October, 1959.

Dissent

WISDOM, Dissenting:

I concur in the holding that the Act is constitutional and that the Administrative Procedure Act is inapplicable. I feel compelled, however, to dissent from the holding that under *Greene v. McElroy* the rules of the Commission are ultra vires.

I.

The Commission's rules may be inadequate, in terms of traditional safeguards accorded a defendant in a criminal trial, but they are the rules Congress authorized for hearings by the Civil Rights Commission.

This case differs radically from *Greene v. McElroy*. Here, Congress took pains to set out in the Act, in its delegation of authority, mandatory rules of procedure to be followed by the Commission. The Commission's rules follow the language of the statute or are based on the intent of the statute.¹ Thus, on the important issue of the right of cross-examination, the Commission rule provides: "Interrogation of witnesses at hearings shall be conducted only by authorized staff personnel."² This is based on the statutory provision, Section 102(c): "Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights." The limitation of the activities of a lawyer to giving advice to his client, is just a way of saying that the lawyer (or his client) cannot cross-examine an adverse witness.

[Role of Traditional Safeguards]

A central issue in the controversy over civil rights legislation was whether witnesses should have the traditional safeguards of notice, confrontation, and cross-examination. The 1956 Civil Rights Bill, H.R. 627, as reported by the House Judiciary Committee, contained no special rules of procedure. H. Rep. No. 2187, 84 Cong. 2d Sess. It was amended on the floor of the House by the addition of elaborate safeguards which Representative Dies of Texas proposed. 102 Cong. Rec. 13542, 13548. This amendment required notice of the subject of the inquiry and confrontation, and allowed limited cross-examination. The bill passed the House, but no action was taken on it in the Senate. In 1957 several bills were introduced containing the same procedural provisions as the 1956 bill, as amended. One of these was S.83, the subject of Senate hearings in 1957.³ The position of the Department of Justice, as stated by the Attorney General, was that "it would be a mistake to make it the vehicle for experimenting with new rules". Hearings, Senate Judiciary Committee, 85 Cong., 1st Sess., p. 14. In the House hearings

on the 1957 Civil Rights proposal Senator, then Representative, Keating asked Attorney General Brownell if the Department would object to the Committee inserting in the bill a provision "similar to those set up in the rules of the House for the conduct of congressional committees". General Brownell stated that the Department had no objection to such rules of procedure. H.R. 6127, adopted into law as the Civil Rights Act of 1957, incorporated the House "Fair Play Rules"⁴ as Section 102 of the Act.⁵

The action of Congress in refusing to adopt a particular bill and adoption of another bill is often an unreliable guide to congressional intent. But the circumstances in which H.R. 6127 became law, rather than S.83 or H.R. 627, make it clear that Congress, after careful deliberation, made a choice of procedures. Congress rejected the traditional safeguards accorded a defendant in a criminal trial and accepted the House "Fair Play Rules".

[Fair Play Rules Considered]

The House "Fair Play Rules" were drawn for the conduct of congressional investigating committees. They were the indirect product of innumerable legal articles, judicial dicta, and editorials.⁶ They were the direct product of

1. See Appendix A and Appendix B.

2. This is the rule universally followed by committees of the House and Senate. It permits a form of cross-examination; submission of written questions to be put to the witness by the Chairman—for whatever that is worth as cross-examination.

3. See Appendix C.

4. Amendment to Rule XI(25) of the Rules of the House of Representatives. Adopted March 23, 1955, 101 Cong. Rec. 3569-85; House Resolution 151, Rules and Manual, United States House of Representatives, 1959, section 735 (1)-(q).

5. Section 102(a) through 102(i) of the statute is identical with the House "Fair Play Rules".

6. For a discussion of the various proposals for a code of procedure before congressional committees, see Maslow, *Fair Procedure in Congressional Investigations: A Proposed Code*, 54 Cal. L. Rev. 839 (1954). For the code proposed by the American Bar Association, see 40 Am. Bar Ass'n Journ. 900 (1954). See the following, some before and some after adoption of the Fair Play Rules, some dealing directly with the procedure before congressional committees and some dealing with the rights of witnesses generally in hearings before investigative or administrative bodies; Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 1953 (1926); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 691 (1926); Herweitz and Mulligan, *The Legislative Investigating Committee*, 33 Cal. L. Rev. 1 (1933); Morgan, *Congressional Investigations and Judicial Review*; Kilbourn & Thompson Revised, 37 Cal. L. Rev. 556 (1949); Davis, *The Requirement of Opportunity to be Heard in the Administrative Process*, 51 Yale L. Journ. 1091 (1942); Liacos, *Rights of Witnesses Before Congressional Committees*, 33 Bos. U. L. Rev. 337 (1953); Symposium on Legislative Investigations: Safeguards of Witnesses, 29 Notre Dame Law., 157 (1954); Keating, *The Investigating*

careful study.⁷ It is safe to say that when the House "Fair Play Rules" were adopted as Section 102 of the Civil Rights Act of 1957 every member of the House and Senate regarded that action as an explicit declaration that Congress affirmatively rejected rules extending to witnesses the rights of notice, confrontation, and cross-examination; that, instead, Congress authorized and directed the Civil Rights Commission to follow its more limited "Fair Play Rules".

This background distinguishes the case from *Greene v. McElroy*. There, the majority's reasoning was the President and Congress would not have delegated to the Department of Defense the power to deprive a man of his job as a result of a hearing in which he has no right of confrontation or cross-examination, without including in the delegation express authorization to by-pass the traditional due process safeguards. Here, Congress expressly authorized the by-pass.

II.

I therefore reach the issue of the constitutionality of the procedure.

A hearing subjecting a subpoenaed witness to public opprobrium, loss of reputation, loss of a job, and possible state and federal prosecution based on testimony brought out at the hearing, carries sanctions no less severe than a criminal trial. Fundamental fairness would seem to require that such a witness have the opportunity to

assert the rights of notice, confrontation, cross-examination, and other due process safeguards. No court however has gone that far.

Mr. Justice Clark, the only member of the Supreme Court who reached the constitutional issue in *Greene*, stated: "(T)he Court has long ago and repeatedly approved administrative action where the right of cross-examination and confrontation were not permitted." Without exception, the courts have drawn a distinction between investigative and adjudicative proceedings. Witnesses in investigative hearings do not have the constitutional rights of a witness in an adjudicative hearing. The Fifth Amendment gives a witness protection in an investigation; the opportunity to assert all due process rights in any later adjudicative proceeding is a sufficient protection.⁸ In *re Groban*, 1957, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed. 2d 376; *Bowles v. Baer*, 7 Cir., 1954, 142 F.2d 787. *Norwegian Nitrogen Prod. Co. v. United States*, 1932, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796.

In *Groban* a majority of the Supreme Court went very far indeed in denying the right to counsel. An Ohio statute, authorizing the State Fire Marshall to investigate the cause of fires, conferred broad powers on the investigating officer. He could hold the investigation in private, exclude counsel, punish witnesses who refuse to testify by summarily committing them to jail, and, if he believed the evidence would warrant a conviction for arson or a similar crime, he could arrest the witness after the investigation. The appellants, who were called upon to testify concerning the cause of a fire at their place of business, refused to testify in the absence of counsel. They were committed to jail. In a habeas corpus proceeding, they contended that they had a constitutional right to counsel under the due process clause of the Fourteenth amendment. The court held, five to four, that appellants had no constitutional right to counsel in giving testimony before an investigative body that does not adjudicate legal rights and responsibilities. If *Groban* was not entitled to due process, no witness is entitled to due process in an investigation.

Taking the law as it is, the Commission's rules are constitutional.

Power of Congress, 14 Fed. Bar Jour. 171 (1954); Kefauver, A Code of Conduct for Congressional Investigations, 8 Ark. L. Rev. 369 (1954); Chase, Improving Congressional Investigations, 30 Temp. L. Q. 126 (1957); Davis, Requirements of a Trial-Type Hearing, 70 Harv. L. Rev. 193 (1956); McKay, The Right of Confrontation, Wash. U. L. Q. 122 (1959). See the following recent notes and comments: Due Process and the Right to Counsel, 33 St. John's L. Rev. 67 (1957); The Civil Rights Act of 1957 and Contempt of Court, 48 Cornell L. Q. 661 (1958); Constitutional Limitations on the Legislative Power of Investigations, 7 Buffalo L. Rev. 267 (1958); Representation by Counsel, 58 Cal. L. Rev. 395 (1958). See also Barth, Government by Investigation (Viking Press, N.Y. 1955) and Taylor, Grand Inquest (Simon & Schuster, N.Y. 1955).

7. In 1954 both houses of Congress held extensive hearings on the matter of committee procedures. Hearings before the Subcommittee on Legislative Procedure of the House Rules Committee, Legislative Procedure, 83d Cong. 2d Sess. (1954); Hearings before the Subcommittee on Rules of the Senate Rules and Administration Committee, Rules of Procedure for Senate Investigating Committees, 83d Cong., 2d Sess. (1954). See also Report of Senate Committee on Rules and Administration to accompany S. Res. 17, Rules of Procedure for Senate Investigating Committees, 84th Cong., 1955.

8. Proponents of the legislation emphasized repeatedly; "The Commission created by the proposal is purely investigatory and empowered only to make recommendations". H. Rep. No. 291, 85th Cong. 1st Sess., p. 6.

III.

The rub in this case comes from the Act itself. It comes from the incongruity of a legislative commission of inquiry investigating specific complaints against individuals accused of crimes.⁹ To my mind, the creation of such a commission is of questionable legislative propriety, at best. It carries grave danger of legislative usurpation, at worst.

The investigation of specific violations of the law is for grand juries, not legislative commissions. With all deference to Congress, a commission, constituted to investigate a broad problem of national interest, has no business holding hearings that must inevitably develop into legislative trials of individuals. When a subpoenaed witness accused of a crime may be subjected to trial by exposure, a fact-finding determination and punishment, he should have the same rights of notice, confrontation, and cross-examination, and all the other hard-earned rights embodied in due process, that any one accused of breaking the law is entitled to when he is tried by a jury before a judge. The Commission does not formally adjudicate guilt or impose a formal sentence, but an individual against whom a complaint is made to the Commission may be exposed to all the hardships of a trial and to punishment in many forms.

The House "Fair Play Rules" are a step in the proper direction—for congressional committees. Procedures suitable for Congress' own committees, however, are less than adequate for a trial by an autonomous commission to which Congress has delegated its power of inquiry.

The high purposes animating the creation of the Civil Rights Commission do not diminish the inherent dangers in legislative trials. They simply obscure the dangerous means used to attain the ends of the legislation.

These, however, are considerations for Congress.¹⁰ On the law, unless the minority view

in Groban should prevail, the Act is constitutional, the rules authorized.

APPENDIX A

RULES OF PROCEDURE
OF THE COMMISSION

Sec. 102. (a) The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

(b) A copy of the Commission's rules shall be made available to the witness before the Commission.

(c) Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(d) The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

(e) If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpoena additional witnesses.

(f) Except as provided in sections 102 and 105 (f) of this Act, the Chairman shall receive and the Commission shall dispose of requests to subpoena additional witnesses.

(g) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than \$1,000, or imprisoned for not more than one year.

(h) In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

(i) Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the Commission.

9. Section 104(a)(1) of the Act (Duties of the Commission) provides: "The Commission shall—(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based."

10. The inclusion in the body of the statute of mandatory rules of procedure is unique in legislation setting up an investigatory commission. This, and the provision requiring application to a court for enforcement of process indicate congressional sensitivity to the problem.

(j) A witness attending any session of the Commission shall receive \$4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of \$12 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpoena issued on behalf of the Commission or any subcommittee thereof.

(k) The Commission shall not issue any subpoena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpoenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business.

APPENDIX B

In addition to these statutory provisions, the Commission has adopted the following supplementary Rules of Procedure:

(a) All the provisions of Section 102 of Public Law 85-315, incorporated in Rule 2 above, shall be applicable to and govern the proceedings of all subcommittees appointed by the Commission pursuant to Section 105(f) of Public Law 85-315, incorporated in Rule 1 above.

(b) At least two members of the Commission must be present at any hearing of the Commission or of any sub-committee thereof.

(c) The holding of hearings by the Commission or the appointment of a subcommittee to hold hearings pursuant to the Provisions in Rule 1 above must be approved by a majority of the members of the Commission or by a majority of the members present at which at least a quorum of four members is present.

(d) Subpoenas for the attendance and testimony of witnesses or the production of written or other matter may be issued over the signature of the Chairman of the Commission by the Chairman or by the Chairman upon the request of a member of the Commission.

(e) Subpoenas for the attendance and testimony of witnesses or the production of written or other matter may be issued over signature of

the Chairman of a subcommittee appointed pursuant to the provisions of Rule 1 above by the Chairman or by the Chairman upon the request of a member of the subcommittee.

(f) An accurate transcript shall be made of the testimony of all witnesses in all hearings, either public or executive sessions, of the Commission or of any subcommittee thereof. Each witness shall have the right to inspect the record of his own testimony. A transcript copy of his testimony may be purchased by a witness pursuant to Rule 2(i) above. Transcript copies of public sessions may be obtained by the public upon payment of the cost thereof.

(g) Any witness desiring to read a prepared statement in a hearing shall file a copy with the Commission or sub-committee 24 hours in advance. The Commission or sub-committee shall decide whether to permit the reading of such statement.

(h) The Commission or subcommittee shall decide whether written statements or documents submitted to it shall be placed in the record of the hearing.

(i) Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel.

(j) If the Commission pursuant to Rule 2(e), or any subcommittee thereof, determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall advise such person that such evidence has been given and it shall afford such person an opportunity to read the pertinent testimony and to appear as a voluntary witness or to file a sworn statement in his behalf.

(k) Subject to the physical limitations of the hearing room and consideration of the physical comfort of Commission members, staff, and witnesses, equal and reasonable access for coverage of the hearings shall be provided to the various means of communications, including newspapers, magazines, radio, news reels, and television. However, no witness shall be televised, filmed or photographed during the hearing if he objects on the ground of distraction, harassment, or physical handicap.

RIGHTS OF PERSONS ADVERSELY AFFECTED BY TESTIMONY

(q) A person shall be considered to be adversely affected by evidence or testimony of a witness if the Commission determines that; (i)

the evidence or testimony would constitute libel or slander if not presented before the Commission or (ii) the evidence or testimony alleges crime or misconduct or tends to disgrace or otherwise to expose the person to public contempt, hatred, or scorn.

(r) Insofar as practicable, any person whose activities are the subject of investigation by the Commission, or about whom adverse information is proposed to be presented at a public hearing of the Commission, shall be fully advised by the Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented. Insofar as practicable, all material reflecting adversely on the character or reputation of any individual which is proposed to be presented at a public hearing of the Commission shall be first reviewed in executive session to determine its reliability and probative value and shall not be presented at a public hearing except pursuant to majority vote of the Commission.

(s) If a person is adversely affected by evidence or testimony given in a public hearing, that person shall have the right; (i) to appear and testify or file a sworn statement in his own behalf, (ii) to have the adverse witness recalled upon application made within thirty days after introduction of such evidence or determination of the adverse witness' testimony, (iii) to be represented by counsel as heretofore provided, (iv) to cross-examine (in person or by counsel) such adverse witness, and (v), subject to the discretion of the Commission, to obtain the issuance

by the Commission of subpoenas for witnesses, documents, and other evidence in his defense. Such opportunity for rebuttal shall be afforded promptly and, so far as practicable, such hearing shall be conducted at the same place and under the same circumstances as the hearing at which adverse testimony was presented.

Cross-examination shall be limited to one hour for each witness, unless the Commission by majority vote extends the time for each witness or group of witnesses.

(t) If a person is adversely affected by evidence or testimony given in executive session or by material in the Commission files or records, and if public release of such evidence, testimony, or material is contemplated, such person shall have, prior to the public release of such evidence or testimony or material or any disclosure of or comment upon it by members of the Commission or Commission staff or taking of similar evidence or testimony in a public hearing, the rights heretofore conferred and the right to inspect at least as much of the evidence or testimony of the adverse witness or material as will be made public or the subject of a public hearing.

(u) Any witness (except a member of the press who testifies in his professional capacity) who gives testimony before the Commission in an open hearing which reflects adversely on the character or reputation of another person may be required by the Commission to disclose his sources of information, unless to do so would endanger the national security.

ELECTIONS

Registration—Louisiana

Emile K. VENTRE, M.D.; Harry J. Kron, Jr.; and Mrs. Geraldine Welch v. Ruby C. RYDER, Registrar of Voters for the Parish of St. Landry; and Mrs. Ruby T. Blanchard and James Lionel Joubert, Deputy Registrars of Voters for the Parish of St. Landry.

United States District Court, Western District, Louisiana, Opelousas Division, August 12, 1959, 176 F.Supp. 90.

SUMMARY: Three individuals brought a class action in federal court for a declaratory judgment and injunctive relief against voter registration officials of a Louisiana parish, alleging that they had registered numerous persons to vote in congressional and other elections who did not meet state voter qualifications, had conspired to prevent plaintiffs from remov-

ing illegal registrants from the rolls, and had carried out their conspiracy by refusing to permit plaintiffs to file more than a token number of challenge affidavits and to photocopy defendants' office records. Plaintiffs contended that state registration laws are federal registration laws, having been expressly adopted by Article 1, Section 2, and the 17th Amendment to the federal constitution and that plaintiffs have a federal constitutional right to have these state laws interpreted and enforced in the first instance by federal district courts under the federal Civil Rights Act. Although the court said defendants had denied plaintiffs of rights they have under state law and could enforce in state courts, it dismissed the case for lack of federal jurisdiction, declaring that the Civil Rights Acts should not be stretched to cover doubtful cases. The court characterized the holding of an election as a "state matter regulated by state laws and conducted by state officials," and ruled that a federal court should not interfere on the basis of a charge of violation of state voter laws unless the case involved discrimination, a denial of the right to register, vote, and have it counted at congressional elections, or the commission of a federal criminal offense. Although the cited provisions of the federal constitution provide that only persons having qualifications requisite for electors in the state may vote in federal elections the court declared that it could not assume that the challenged registrants were not qualified electors, since they are eligible to vote under state law until disqualified in proceedings provided by state law. Further, it was pointed out that defendant officials could not be said to have denied plaintiffs equal protection of state laws in violation of the Fourteenth Amendment when plaintiffs themselves had alleged that defendants had disobeyed the state statute.

HUNTER, District Judge.

This action for a declaratory judgment and injunctive relief is brought by plaintiffs in behalf of themselves and of all persons properly qualified and registered to vote in St. Landry Parish, Louisiana.

The complaint, after detailing defendants' status as that of Registrar and Assistant Registrars, *alleges* that defendants and their predecessors in office registered thousands of persons to vote in congressional and other elections who did not meet the qualifications requisite for electors under Louisiana law; that defendants have engaged in a scheme or conspiracy to prevent plaintiffs and others from removing these illegal registrants from the rolls prior to the forthcoming state and congressional elections; that defendants have carried out this conspiracy by certain overt acts, including the refusal to permit plaintiffs to file more than a token number of affidavits of challenge and refusal to permit plaintiffs to photocopy the records of defendants' office.

On the day and hour set for hearing, defendants filed an answer setting up various defenses, including exceptions to the jurisdiction. Counsel for both sides agreed that these exceptions should be referred to the merits.

The facts are not in serious dispute and the Registrar was the only witness.¹ A number of

issues concerning Louisiana law and the application and/or lack of application of that law by the Registrar are involved. In actions of this nature, mere pleaded conclusions asserting the violation of constitutional rights do not necessarily confer jurisdiction. Therefore, it is fitting and proper that we ascertain what the Louisiana law is and what defendants are accused of doing, have done, and are doing:

(1) The voter registration application provided by the Louisiana Constitution was devised as a test of the applicant's intelligence and literacy. That is why the Louisiana Constitution specifically provides that the form must be entirely written, dated and signed * * * in the presence of the registration officer or his deputy, without assistance or suggestion from any person or any memorandum whatever, other than the form of application hereinafter set forth * * * Louisiana Registrars do not have the authority to assist persons applying to register in filling out these applications and/or to permit others to help them.²

In recent years these two provisions of Louisiana law have been more honored in the breach than in the observance. The defendant Registrar

2. Article VIII, Section 1, La. Constitution of 1921, LRS 18:31(3). *Lono v. Sherburne*, 122 La. 434, 47 So. 760; *Smith v. Dardenne*, 129 La. 835, 56 So. 905; *Thomas V. McElveen*, Civil Docket No. 18,751, D.C., Washington Parish, La.; Reports and Opinions of Attorney General, 1942-1944, pg. 457; 1944-1946, pg. 202.

1. The testimony of other witnesses was stipulated.

and her predecessors in office (by custom and usage) have for many years rendered assistance and have not required the application blanks to be filled out in detail. This has resulted in the presence on the registration rolls of many voters not registered in strict compliance with the mandatory provisions of the statutes. Recently the defendants have adopted the policy of following the law in these particulars. The Registrar assures us that she will continue to do so. We have no reason to doubt the lady.

(2) (a) Plaintiffs, together with other voters of St. Landry, recently inaugurated a program of canvassing the registration rolls of the parish and challenging those persons allegedly not registered in accordance with the law. This so-called "clean-up" or "purge" is sanctioned by Louisiana law.⁵ The method of removal of illegally registered voters set up in each of the two cited sections is unique in that it all but

eliminates discretionary action on the part of the Registrar and reduces her duties to those purely ministerial in character. If the challenging affidavit is in proper form and states a ground sufficient in law, the Registrar must proceed to take the prescribed action (Thomas v. McElveen, La. D.C., Parish of Washington, April 1959; the Flournoy case decided in Winn Parish on August 10, 1959). Here, the Registrar has refused to accept more than twelve or thirteen challenges a day and it would, at this rate (according to plaintiffs), take in excess of two years to "clean up" the rolls.⁴ This action on the part of the Registrar denies to plaintiffs a legal right that they have under the Louisiana law. The Louisiana law which creates the duty on the part of the Registrar also creates a specific right in behalf of the plaintiffs to enforce that duty in the state court:

LRS 13:134. "Refusal or failure of registrar to mail notice or erase name; summary court proceedings."

"Should the registrar fail or refuse to mail the notice, to make the publication, or to erase a name when by the provisions of this Chapter it becomes his duty to do so, the person making the affidavit may, *by rule on the registrar returnable within forty-eight hours after service, excluding Sundays and legal holidays, apply to the district court for the parish, without cost, and cause the registrar to show cause why such should not be done.* The rule shall be tried in a summary way and by preference, in term time or in vacation, and the court shall immediately upon conclusion of the hearing enter its order in the premises. If the rule is granted, it shall fix a period of not more than three

3. *LRS 18:133. "Illegal registration or loss of right to vote; notice to registrant; erasure of names on failure to prove right."*

"Upon an affidavit signed and sworn to in duplicate before and filed with the registrar or his deputy by any two bona fide registered voters of the parish, to the effect that after reasonable investigation and on information and belief certain persons are illegally registered, or have lost their right to vote in the precinct, ward, or parish in which they are registered by reason of removal or otherwise, the registrar shall immediately, or, in any event, within forty-eight hours, notify the registrants by mailing to them postage prepaid at the addresses given in the precinct register, the duplicate copy of the affidavit, together with a printed citation requiring them to appear in person before the registrar or his deputy within ten days from date of the mailing of the duplicate affidavit and citation, which date shall be stated in the citation, and prove their right to remain on the registration rolls by affidavit of three bona fide registered voters in the form as provided in R.S. 18:132. The registrar shall immediately make a similar publication, as provided for in R.S. 18:132, and if the challenged registrants fail, within the same delays provided in that Section, to prove their right to remain on the rolls, as in that Section provided, the registrar shall erase their names from the precinct register."

LRS 18:245. "Illegal registration or loss of right to vote; notice to registrant; cancellation of name on failure to prove right."

"Upon a written affidavit signed and sworn to in duplicate before and filed with the registrar or his deputy by any two bona fide registered voters of the parish, to the effect that after reasonable investigation and on information and belief certain persons are illegally registered, or have lost their right to vote in the precinct, ward, or parish in which they are registered by reason of removal or otherwise, the registrar shall immediately, or, in any event, within forty-eight hours, notify the registrants by mailing to them postage prepaid, under P. O. Form 3547—Requested, at the addresses given in the registration records, the duplicate copy

of affidavit, together with a printed citation requiring them to appear in person before the registrar or his deputy within ten days from the date of the mailing of the duplicate affidavit and citation, which date shall be stated in the citation, and prove their right to remain on the registration rolls by written affidavit of three bona fide registered voters in the form as provided in R.S. 18:132. The registrar shall immediately make a similar publication, as provided for in R.S. 18:132, and if the challenged registrants fail, within the same delays provided in that Section to prove their right to remain on the rolls, as in that Section provided, the registrar shall cancel their names from the registration records as provided by R.S. 18:135. Added Acts 1952, No. 415, §2."

4. Defendant Registrar asserts that she does not have time to process more than twelve challenges per day. She has refused offers of stenographic assistance, and/or financial assistance to aid in the processing of challenges tendered by plaintiffs.

days from the date of the order within which the registrar shall comply therewith, and failing in which the registrar shall be held in contempt of court and punished accordingly."

(2) (b) Defendant is refusing to send out many of the challenges which were filed with her. This she has refrained from doing, she says, because she does not know who is or who is not an illegally registered voter. She is exercising discretion as to whether or not to send out the challenges at all. Again she is not carrying out the ministerial duties specifically required of her. This action, too, on the part of the Registrar and her assistants, denies to plaintiffs a legal right they have under the Louisiana law. The Registrar's duty in this connection under the law as it is written and as it has been interpreted, is ministerial, the performance of which may be required by the simple process of asking relief in the Louisiana state court under the provisions of LRS 18:134 (*supra*).

(3) The Louisiana law requires the Registrar to permit photocopying of the registration rolls when and if she is furnished a petition therefor signed by 25 qualified voters. The petition here was signed by 25 qualified voters (they were not challenged in accordance with law). The Registrar refused permission to photocopy and pegged her refusal on the proposition that the names on the petition did not identically conform with the same names on the registration application. (For example, Mrs. John N. Doe on the petition, and Mrs. J. N. Doe on the registration card.) Technically, her refusal was not improper. She states that when presented with a new petition with identical conformity that the permission to photostat will be granted. Public confidence demands public disclosure. The public has a right to know, and the law recognizes that.

Summarizing the Louisiana law and the Registrar's action, we find:

(a) That she and her assistants are denying to the plaintiffs certain rights that the plaintiffs have under state law to challenge registrants.

(b) That the Registrar and her assistants have in the past rendered assistance to prospective applicants and permitted others to do so.

(c) That the Registrar and her assistants

have in the past not required the registration blanks to be filled out in minute detail.

(d) That as a result of the actions of the Registrar and her assistants, many voters who were not registered in accordance with law are presently on the rolls of St. Landry Parish, and will vote in state and congressional elections unless removed.⁵

(e) As other courts have done, we disregard as mere conclusions the factually unsupported characterizations of the acts of defendant as conspiratorial and discriminatory. There is no conspiracy. Mrs. Ryder is the "boss"; the others follow her instructions. There is no discrimination. It is obvious that the Registrar is not in sympathy with the plaintiffs' efforts and that she is not going to carry out the provisions of LSA: RS 18:132 and 18:245 (*supra*) unless compelled to do so by court order.

(f) The state law spells out a summary state procedure to force compliance with 18:132 and 18:245. Plaintiffs have chosen not to pursue their state remedies. They seek relief here, asserting that state courts cannot carry the assurance needed to restore the Registrar's confidence in her right to enforce the state registration laws and that only a firm declaration by a federal court that state registration laws are federal laws, and must be enforced, can restore confidence.

JURISDICTION

Our consideration of the jurisdictional issue begins with two fundamental propositions, namely: (1) Under our constitutional system, the qualification of voters is a matter committed to the states, subject only to federal constitutional restraints prohibiting discrimination on a count of race, color, sex, etc. (*Polk v. Williams*, 193 U.S. 621, 24 S.Ct. 573); (2) Clearly, the right of citizens to cast ballots and have them counted at congressional elections, in accordance with applicable state laws, is a right secured by the federal Constitution, and this right, unlike those carried by the Fourteenth and Fifteenth Amend-

5. It should be noted that the Court has been careful not to label these voters "as lacking the qualifications requisite for electors of the most numerous branch of the State Legislature." Under Louisiana law they have the right to vote unless challenged and removed in accordance with the express provisions of the Louisiana law heretofore discussed. (*LeBlanc v. Primeaux*, 2 So.2d 274; *Perez v. Cognovich*, 156 La. 331, 100 So. 444).

ments, is secured against the action of individuals as well as states.⁶

Plaintiffs do not assert that they have been denied the right to register, but are asserting that others may exercise the right to vote who are not registered in conformity with applicable state statutes, and that they, the plaintiffs, have a federal constitutional right to have such registrants removed from the rolls. It is urged that this action encompasses two separate concepts of federal jurisdiction. The first of these is that the right to have these so-called unqualified registrants removed from the rolls is a federal right guaranteed by Article I, Section 2 of the United States Constitution, and Amendment Seventeen thereof. The second is the Fourteenth Amendment with its guarantee of equal protection and prohibition against abridging privileges or immunities of citizens of the United States.

THE FOURTEENTH AMENDMENT

We do not comprehend the principle on which the state, acting through the Registrar, can here be said to deny plaintiffs the equal protection of the laws of the state when the very foundation of plaintiffs' claim is that the Registrar has disobeyed the authentic command of the state statute. Besides, it is clear that the wrongful interpretation or the misapplication of the Louisiana law would not give this Court jurisdiction or amount to a violation of the Fourteenth Amendment. *Discrimination alone can justify maintaining the action* and granting the relief sought under the Fourteenth Amendment.⁷

ARTICLE I, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES, AND THE SEVENTEENTH AMENDMENT

Article 1, Section 2 (1):

"The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of

the most numerous branch of the State legislature." (Emphasis ours)

The Seventeenth Amendment:

"The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. *The electors in each state shall have the qualifications requisite for electors of the numerous branch of the State legislature.*" (Emphasis)

Remedies for the abridgment or violation of these constitutional rights have been provided by the following statutory provisions of the Federal law:

(1) "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. 1343.

(2) "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. 1983

Able counsel for plaintiffs vigorously insist that state registration laws are federal registration laws, being laws expressly adopted by the federal Constitution (Art. 1, Sec. 2, and the 17th Amendment), and that plaintiffs are vested with a federal constitutional right to have these state laws interpreted in the first instance

6. Art. 1, Sec. 2 (1), U. S. Constitution; Amendment XVII of the U.S. Constitution; U.S. v. Classic, 61 S.Ct. 1031; Fields v. U.S., 4 C.C.A. 228 F.2d 544; and Tullier v. Giordano, 5 C.C.A., 265 F.2d 8.

7. Snowden v. Hughes, 1944, 321 U.S. 1, 64 S.Ct. 397.

and enforced in the first instance by federal district courts under the Civil Rights Acts (*supra*).

We all agree that Article 1, Section 2, of the Constitution and the Seventeenth Amendment do grant rights and privileges to each citizen of the United States, and the right of a citizen to register, cast his ballot, and have it counted at congressional elections, in accordance with applicable state laws, is such a right. But, do plaintiffs have a federal constitutional right under the provisions of law heretofore quoted to have state registration laws interpreted by the federal courts? Do they have a federal constitutional right to have these prospective voters (who may not have been registered in conformity with state law) removed from the rolls?

The Civil Rights Acts under which plaintiffs invoke federal jurisdiction have uniformly been given a narrow construction and a limited application by the Supreme Court of the United States.⁸ We have neither the right nor the desire to deviate from this policy. The Civil Rights Acts are "not to be used to centralize power,"⁹ nor "stretch" to cover doubtful cases. To say the least, this is a doubtful case.

Plaintiffs, relying on *Tullier*,¹⁰ and *Classic*¹¹ insist that federal jurisdiction has already been extended beyond the facts of this case. I cannot agree. *Tullier* simply reiterates the well-established principle that one has a federal constitutional right to register and vote if he possesses the necessary qualifications therefor under the state law. *Classic* involved a criminal prosecution. The overt acts with which defend-

ants were charged with the altering of 83 ballots cast for Congressional candidate "A", and 14 ballots cast for Congressional candidate "B", and the marking and counting of these ballots for Congressional candidate "C". There, the Court consistently held that a qualified voter in a congressional election has a federal congressional right not only to cast his ballot, but to have that ballot counted as cast. Everyone agrees that "cheating" and "ballot box stuffing" at congressional elections constitute a federal criminal offense (18 U.S.C.A. 241).

The present case does not involve discrimination. It does not involve the denial of a right to register and vote, as in *Tullier*. It does not involve a criminal offense, as in *Classic*. The major premise of plaintiffs' argument is that "the guarantee that only persons having the qualifications requisite for electors in the state shall vote in federal elections is a right secured to plaintiffs by the United States Constitution." On that premise they then argue that this Court has jurisdiction to render a declaratory judgment defining the legal rights and relations of the parties under state registration laws, and to issue an injunction against defendants ordering them to carry out certain particulars of these laws. Plaintiffs' argument assumes that the registrants whom they wish to challenge are not qualified electors. We have no right to indulge in such an assumption. If an election were held tomorrow, these voters could vote in state and federal elections, and could do so legally under the state law.¹² Their qualifications can only be attacked by "tracking" the state statute.¹³ Plaintiffs' prayer for injunctive relief is in effect a request that this Court order the Registrar to comply with the state law by taking the first step respecting the processing of challenges that might result in the subject voter's name being stricken from the rolls. The provisions of the Louisiana law are explicit. Upon affidavit, the Registrar is required to immediately mail out the challenge, together with a citation requiring the Registrant to appear within ten days and prove his right to remain on the rolls by affidavit of three bona fide registered voters. If the registrant appears within a certain time and

8. Following is a chronological list of the illustrative Supreme Court cases: *In re Slaughter-House Cases*, 1872, 16 Wall. 36, 83 U.S. 36, 21 L.Ed. 394; *Minor v. Happersett*, 1874, 21 Wall. 162, 88 U.S. 162, 22 L.Ed. 627; *United States v. Cruikshank*, 1875, 92 U.S. 542, 23 L.Ed. 588; *United States v. Reese*, 1875, 92 U.S. 214, 23 L.Ed. 563; *State of Virginia v. Rives*, 1879, 100 U.S. 313, 25 L.Ed. 667; *Hague v. C.I.O.*, 1939, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; *United States v. Classic*, 1941, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; *Snowden v. Hughes*, 1944, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497; *Screws v. United States*, 1945, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495; *United States v. Williams*, 1951, 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758; *Williams v. United States*, 1951, 341, U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774; *Tenney v. Brandhove*, 1951, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; *Collins v. Hardyman*, 1951, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253; *Stefanelli v. Minard*, 1951, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138.

9. *Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937.

10. *Tullier v. Giordano*, 265 F.2d 1, 5 C.C.A., 1959.

11. *U.S. v. Classic*, 331 U.S. 299, 61 S.Ct. 1031.

12. *Opinions of the Attorney General*, 1944-1946 pg. 568; *LeBlanc v. Primeaux* (1941) 2 So.2d 274; *Perez v. Cognevich*, 156 La. 331, 100 So. 444.

13. There are two provisions under which a purge of voters of an extremely summary nature may be made (Title 18, Sections 132 and 133, L.S.A.-R.S.).

proof is submitted by him in the form of an affidavit signed by three bona fide registered voters of the parish, that such person is legally entitled to remain on the books of registration, his name shall so remain. But, if the registrant does not appear and make this proof within the period of delay allowed by law, his name shall be erased by the Registrar from the precinct register. Should the Registrar fail or refuse to mail the notice, to make the publication, or to erase a name when required by law to do so, the person making the challenging affidavit (in this case, the plaintiffs) may, by rule on the Registrar, returnable within 48 hours, apply to the state district court and cause the Registrar to show cause why such should not be done. This rule, under the state law, is to be tried in a summary way and by preference, in term time or in vacation.

[Right To Remain]

We emphasize that the right of one to remain a qualified elector, once he is on the rolls, and the right of others to challenge, are rights secured by state statutes with special provisions for summary state court reviews. Here, plaintiffs ignore their state remedies and proceed directly in this Court.

The holding of an election is a state matter regulated by state laws and conducted by state officials. There is no good reason why a federal court sitting in Louisiana (*in the absence of discrimination*) should render a declaratory judgment and/or grant injunctive relief based on the violation of these state laws. The question of whether or not a voter is a qualified elector

is a state matter to be determined by state law and state courts.

If, as plaintiffs claim, state registration laws are federal laws, and consequently drawn into the "voracious maw" of federalism, then it necessarily follows that the federal courts, upon proper petition, have the duty to examine the registration blanks filled out by each and every registered voter in the United States and decide whether or not that registrant has complied with every state technicality. This cannot be the law. Only harm could ensue from such a policy which would require federal judges to become super registrars with the power to ride herd over state officials.

This Court has the highest respect for plaintiffs and their eminent counsel, but as we view their espousal here of the theory that federal courts should essay the rolls of super registrars, it is appropriate to say to them that one day, they may be reminded of Mary Shelley's terrified self-reproach in *Frankenstein*: "I behold the wretch, the miserable monster whom I have created."¹⁴

Plaintiffs' remedy lies in a re-invigoration of state responsibilities—not in inviting an undue incursion of federal authority into local duties.

We leave the parties to their remedies in the state courts of Louisiana. This Court has no jurisdiction of this case, and the case should be dismissed. It is.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 12th day of August, 1959.

14. Judge Lynne in *Baldwin v. Morgan*, 149 F.Supp. 234.

ELECTIONS

Registration—Civil Rights Act

UNITED STATES of America v. Diaz D. McELVEEN et al.

United States District Court, Eastern District, Louisiana, New Orleans Division, October 7, 1959, 177 F.Supp. 355.

SUMMARY: The United States brought an action in federal court under the Civil Rights Act of 1957 [2 Race Rel. L. Rep. 1011 (1957)] against several members of the Citizens' Council and the registrar of voters for Washington Parish, Louisiana, charging that defendants, acting under color of state law and in conspiracy with the Citizens' Council in fraudulently

professing to purge parish registration rolls of all persons illegally registered, had deprived named Negro citizens of their right to vote because of their race. Defendants moved to dismiss, contending that sections 1971(a) and (c) of Title 42 are unconstitutional because they might be broadly interpreted to cover actions against private persons. The motion was denied. The court noted that the United States had admitted that those sections, since they specifically apply to all elections, are predicated on the Fifteenth Amendment; and that the Supreme Court had held that, to be appropriate under the Fifteenth Amendment, legislation must be directed against persons acting under color of law. Although the phrase "under color of law" does not literally appear in the challenged sections, the court stated that the intention that they be applied only to persons acting under color of law is clearly indicated by the language "any constitution, law, custom, usage, or regulation of any State or Territory, or under its authority, to the contrary notwithstanding." It was further held that the defendants here were not in position to challenge the sections on the ground that they might be too broadly applied as to other persons under other circumstances, the court invoking the rules of statutory construction that a statute's constitutionality will not be determined unless it is absolutely necessary to the decision of the case, will not be tested in the abstract without reference to the facts of the case, and can be challenged only insofar as the issue affects the litigants in the case at hand. [*Contra: United States v. Raines*, 172 F.Supp. 552, 4 Race Rel. L. Rep. 314 (M.D. Ga. 1959); *Jurisdiction postponed*, 79 S.Ct. 1448, 4 Race Rel. L. Rep. 255 (1959)].

WRIGHT, District Judge.

In the spring of 1959 the Citizens' Council, professing a purpose to purge the registration rolls of Washington Parish, Louisiana, of all persons illegally registered, succeeded in disenfranchising 85% of the Negro voters of the Parish and 0.07% of the white. The United States in this action charges that this profession of high purpose was a fraud designed to deny Negro citizens of a right to vote. Made defendants and charged with conspiring with the Citizens' Council are several members of the Council and the Registrar of Voters for Washington Parish.

The defendants have moved to dismiss, alleging the unconstitutionality of certain sections¹ of the Civil Rights Act of 1957 under which the United States is proceeding. They admit that under the Fifteenth Amendment, Congress may

authorize the United States to seek injunctive relief to protect citizens against state action denying their right to vote because of race. They contend, however, that Section 1971(c) is unconstitutional in that it may be interpreted as authorizing such action against private individuals as well as persons acting under color of law.

The complaint here specifically charges that the defendants, acting under color of state law, have deprived certain named citizens of their right to vote because of their race. The motion to dismiss, of course, admits the truth of these allegations. There is, therefore, no contention that legislation covering the facts of this case would be invalid. The position of defendants simply is that because Section 1971(c) may be more broadly interpreted, it is unconstitutional.²

The defendants' contention is so obviously without merit that this Court would merely deny the motion to dismiss without more were

1. 42 U.S.C.A. § 1971(a) and (c). These provisions read as follows:

"(a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

"(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the

United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

2. The defendant Registrar of Voters makes the additional contention that the function he performed in disenfranchising the voters was purely ministerial and was required by state statutes. The complaint, however, specifically charges that he knowingly participated in the discrimination. Moreover, the Registrar is an indispensable party to the granting of the relief. See *Williams v. Fanning*, 332 U.S. 490, 68 S.Ct. 188, 92 L.Ed. 95.

it not for the fact that a district court has upheld a similar contention and declared Section 1971(c) unconstitutional.³ In so doing, that Court ignored the most elementary principles of statutory construction, as repeatedly announced by the Supreme Court, and relied on an old case⁴ interpreting a criminal statute.

[Two Accepted Propositions]

It is true that the various civil rights acts have been the subject of much confused litigation. Out of this confusion, however, have emerged two propositions, both of which have now won general acceptance. The first of these is that the Congress may, without reference to the Fifteenth Amendment, pass any legislation reasonably designed to protect citizens in the exercise of any right guaranteed by the Constitution.⁵ The right to participate in the election of federal officers is so guaranteed.⁶ Article I, Section 4, of the Constitution specifically authorizes Congress to regulate the manner of holding elections for federal office. Article I, Section 8, Clause 18, states that Congress is given authority "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Under this authority, presumably Congress may also control the registration, but not the qualification,⁷ of voters in federal elections, since such authority would certainly be reasonably necessary to insure their proper conduct.

[Fifteenth Amendment Requirements]

The second proposition relates to the power of Congress to control all elections for state or federal office. With reference to such elections, the Fifteenth Amendment imposes on Congress the duty to protect citizens from being denied their right to vote "by the United States or by any State on account of race, color, or previous condition of servitude." To be appropriate under the Fifteenth Amendment, legislation must be directed against persons acting under color of law, state or federal, and it must relate to the

denial, by such persons, of citizens' right to vote because of race. Any congressional action which does not contain these two elements cannot be supported by the Fifteenth Amendment.⁸

It is admitted by the United States that the sections of the Act in suit, since they specifically apply to all elections, are predicated on the Fifteenth Amendment. The United States contends that these sections must be read together, and when so read, apply only to persons acting under color of law. The United States also maintains that, conceding these sections may be construed more broadly so as to cover hypothetical cases involving actions against private individuals, since the defendants in suit are within the legitimate reach of the legislation, the extended interpretation thereof with reference to persons not before the Court is unnecessary. Certainly, the Government contends, no court should reach out for these imaginary persons, and, in effect, bring them into this litigation in order to declare the Act unconstitutional.

["Under Color of Law"]

It is true that Sections 1971(a) and (c), in outlining their area of operation, do not use the talismanic phrase "under color of law." By reading Sections 1971(a), (b), and (c), however, the legislative purpose and intent become obvious. Section 1971(a) applies to all elections and to all persons acting under color of law. The last clause in the section makes this clear.⁹ Section 1971(b) relates only to federal elections and is not limited to persons acting under state law. Section 1971(c) authorizes the United States to seek injunctive relief where there has been a violation of either (a) or (b). Even if one had difficulty literally reading into Section 1971(a) the limitation to persons acting under color of law, any doubt respecting the intent of Congress can be resolved by reference to the prior jurisprudence outlining the permissible reach of the Fifteenth Amendment and restricting it specifically to persons acting under color of law.¹⁰ No court is authorized to assume that Congress, in enacting this legislation, was igno-

3. *United States v. Raines*, D.C.M.D.Ga., 172 F.Supp. 552.

4. *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563.

5. *United States v. Williams*, 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758; *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429; *Ex Parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274.

6. See Note 5.

7. The qualification of voters in federal elections is prescribed by Article I, Section 2 of the Constitution.

8. *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152; *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987; *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979.

9. The last clause reads:

"... any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

10. See Note 8.

rant of the uniform jurisprudence of the Supreme Court on the subject.¹¹ In fact, it is a cardinal rule of statutory construction that such jurisprudence may serve as a guide to interpretation.¹²

[Statutory Construction Rules]

There are other elementary rules of statutory construction which may be consulted if one were in doubt as to the meaning of the Act. The first of these is that the constitutionality of an act will not be determined unless it is absolutely necessary to the decision of the case.¹³ From this primary principle have evolved two rules of construction, both of which apply here: (1) the constitutionality of statutes will not be tested in the abstract without reference to the facts of the case at hand,¹⁴ and (2) litigants may challenge the constitutionality of a statute only in so far as it affects them.¹⁵

11. The legislative history of the Act shows that Congress was aware of this jurisprudence and sought to draft legislation to meet its constitutional requirements. See Notes 17, 18, 19, and 20.

12. *Shapiro v. United States*, 335 U.S. 1, 16, 68 S.Ct. 1375, 92 L.Ed. 1787; *Hecht v. Malley*, 265 U.S. 144, 153, 44 S.Ct. 462, 68 L.Ed. 949. See also *State of Missouri v. Ross*, 299 U.S. 72, 75, 57 S.Ct. 60, 81 L.Ed. 46; *Sessions v. Ronadka*, 145 U.S. 29, 42, 12 S.Ct. 799, 36 L.Ed. 609.

13. See *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567, at page 590, 77 S.Ct. 529, at page 540, 1 L.Ed.2d 563:

"The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against passing on the validity of an Act of Congress 'unless absolutely necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482."

See also cases collected in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, at page 345, 56 S.Ct. 466, at page 482, 80 L.Ed. 688.

14. See also *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, at page 219, 33 S.Ct. 40, at page 41, 57 L.Ed. 193:

"Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand, and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid."

See *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, at page 39, 5 S.Ct. 352, at page 355, 28 L.Ed. 899:

"It (the Court) has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies."

15. See *Fleming v. Rhodes*, 331 U.S. 100, at page 104, 67 S.Ct. 1140, at page 1142, 91 L.Ed. 1368:

"Litigants may challenge the constitution-

ality of a statute only in so far as it affects them."

Here we have defendants, all admittedly acting under color of state law, charged with denying citizens their right to vote because of their race. Unquestionably, to the extent it affects them, the Act is appropriate under the Fifteenth Amendment. There can be no question but that they are covered by its terms. In fact, they admit it. Their point is that the legislation may be interpreted as covering others not before the Court, individuals not acting under color of law. This Court has no right to consider these imaginary persons in the hypothetical situations conjured up by the defendants in determining whether or not the Act may be constitutionally applied to the facts of this case and to the defendants before this Court. The duty of this Court is to strain, if necessary, to save the Act, not to destroy it.¹⁶

The legislative history of this legislation shows that Congress was aware of the widespread attempt to disenfranchise the Negro, overtly through statutory enactments, and covertly through discriminatory administration of voting laws. Congress was also aware that disenfranchisement can be accomplished only with the cooperation of persons acting under color of state

ality of a statute only in so far as it affects them.

See also *United States v. Wurzbach*, 280 U.S. 396, at page 399, 50 S.Ct. 167, at page 169, 74 L.Ed. 508:

"It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns."

See also *Heald v. District of Columbia*, 259 U.S. 114, at page 123, 42 S.Ct. 434, at page 435, 66 L.Ed. 852:

"It has been repeatedly held that one who would strike down a state statute as violative of the federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. In no case has it been held that a different rule applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held."

See also *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666; *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; *Jeffrey Manufacturing Co. v. Blagg*, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364.

16. See *Screws v. United States*, 325 U.S. 91, at page 100, 65 S.Ct. 1031, at page 1035, 89 L.Ed. 1495:

"Only if no construction can save the Act from this claim of unconstitutionality are we willing to reach that result."

law since registration rolls are in the custody and under the control of state officers. Reference to the hearings,¹⁷ the Committee reports¹⁸ and the floor debate¹⁹ on the legislation all demonstrate this awareness. This legislative history also shows beyond question that Congress was cognizant of its constitutional limitations and deliberately sought to enact legislation within those limits.²⁰ To say that Congress failed in this en-

deavor is to misread the language of the Act and to defile its great purpose.

[Vote Deprivation Decried]

In a democratic society there is no greater offense than illegally depriving a citizen of his right to vote. Such discrimination strikes at the very foundation of constitutional government. This offense is compounded when, as alleged here, it is committed under the guise of enforcing the law. The United States has made the solemn charge that these defendants have committed such an offense. Instead of challenging the constitutionality of the Civil Rights Act of 1957, these defendants should be searching their souls to see if this charge is well founded. This Court will make that determination after it hears all the evidence.

The motions to dismiss are denied.

17. Hearings before Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Session; Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Session. Hearings before Committee on Rules, House of Representatives, 85th Cong., 1st Session, on H.R. 6127 at p. 44.
18. House Report No. 291, 85th Cong. 1st Session; Report to Accompany S.83, 85th Cong. 1st Session, Subcommittee Print.
19. 103 Cong.Rec. 12150, 12565, 12829, 13138, 13876, 13324, 13333, 13319, 13322, 12149, 13120, 13126, 8498, 9396, 12896, 12900, 13006, 13732, 13320.
20. In addition to Notes 17, 18, and 19, see 103 Cong. Rec. 13834, 13159.

EMPLOYMENT

Labor Unions—Federal Statutes

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, International v. NORTH-WEST AIRLINES, Inc.

United States Court of Appeals, Eighth Circuit, May 29, 1959, 267 F.2d 170.

SUMMARY: An airlines stewards and stewardesses association petitioned a federal district court to impeach an arbitration award issued by the National Mediation Board in a dispute between employees and their airline employer, which arose over employment terms concerning the entirely foreign segments of flights between the United States and the Orient. The award amended an employment agreement so as to exclude from the coverage thereof foreign nationals employed as cabin attendants on such flights. In sustaining the award, the court held that the Railway Labor Act as applicable to air carriers does not include employees who are crew members on flights between points outside the United States and its territories. On appeal, the Court of Appeals for the Eighth Circuit affirmed. The association argued that, solely on the basis of lack of citizenship, the award deprives foreign nationals serving under the American flag of a right to be represented without discrimination by a representative chosen by a craft majority, excludes them from access to the system board of adjustment, and perpetuates pay differentials between foreign nationals and Americans holding the same type position on the same plane, all of which was contended to be an application of a nondiscriminatory law in a manner unconstitutionally to discriminate between persons because of citizenship. The court rejected this argument, stating that the exclusions from the Railway Labor Act are not based on race, color, citizenship, or national origin, but are applicable to anyone employed and performing services outside the United States and its territories. The United States Supreme Court denied certiorari. 28 L.W. 3167, 4 Race Rel. L. Rep. 851, *supra* (1959).

GOVERNMENTAL FACILITIES Airport Waiting Rooms—South Carolina

Richard B. HENRY v. GREENVILLE AIRPORT COMMISSION, O. L. Andrews, Manager, Greenville Municipal Airport, William T. Adams, Chairman, and Hugh G. Aiken, et al., Members of the Greenville Airport Commission.

United States District Court, Western District, South Carolina, Greenville Division, August 5, 1959, 175 F.Supp. 343.

SUMMARY: An action asserting federal jurisdiction on the basis of diversity of citizenship, general federal question, and as a class action under federal civil rights statutes was brought in a federal district court by a Negro against the Greenville, South Carolina, airport commission, members thereof, and the airport manager. The complaint alleged that the manager, even though informed that plaintiff was an interstate traveler, ordered him to use a racially segregated waiting room. Plaintiff's motion for a preliminary injunction to restrain defendants from making distinctions based on color relative to services at the airport was denied because it was not shown to be necessary to protect plaintiff's rights, since he might never return to the airport; the assertion that he was discriminated against was found not to be based on facts warranting an inference of racial discrimination; and it was not alleged that defendants had denied him any right under color of state law. The court granted defendants' motions to strike as immaterial plaintiff's complaint paragraphs invoking general federal question and diversity jurisdiction because of lack of showing of the \$10,000 jurisdictional amount. It also struck the paragraphs requesting relief for all other Negroes similarly situated as a class, as plaintiff had failed to allege that defendants had accorded unequal treatment to other Negroes or that defendants were impecunious or could not for other reason be made to respond in damages for any civil wrong done to him or any other Negro now or in the future; and even if this were in the nature of a "spurious class suit," the court held that it would fail as such because no other Negro had asked to be made a party to it. The allegation that defendants received contributions from "the Government" to construct and maintain portions of the airport was also stricken because it was held to have nothing to do with the claim that he had been deprived of a civil right under state law. Defendants' motion to dismiss was granted because plaintiff, not having alleged that anything complained of was done under color of a specified state law, failed to state a cause of action under Section 1343 of Title 28; and, it being inferable from the complaint that he went into the waiting room in order to instigate litigation rather than in quest of waiting room facilities, he had no cause of action under Section 1981 of Title 42, which was said to place duties on Negroes equal to those imposed on white persons and to confer no rights on Negroes superior to those accorded white persons. It was emphasized that activities which are required by the state must be distinguished from those carried out by voluntary choice by individuals in accordance with their own desires and social practices, the latter kind not being state action.

TIMMERMAN, J.

Motions in the above stated case were heard on July 20, 1959, at Columbia, South Carolina. There was, on behalf of the plaintiff, a motion for a preliminary injunction, and, on behalf of the defendants, motions to strike paragraphs 1(a), 1(c), 2 and 5 of the complaint, "on the ground it appears upon the face of the complaint that the said allegations are immaterial," and a motion to dismiss the complaint, on the grounds "(1) That the Court has no jurisdiction of the subject matter of the action" and "(2) That the

complaint fails to state a claim upon which relief can be granted." The motion to dismiss is under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

PLAINTIFF'S MOTION

This motion was filed January 24, 1959. When it was called for hearing, July 20, 1959, counsel for plaintiff offered two additional affidavits for use on the hearing and at that time furnished copies for the first time to counsel for the de-

fendants, who objected to the use of the affidavits on the hearing because they had had no time to read or to prepare a reply to them. The Court ruled that it would continue the hearing of the motion to give the defendants an opportunity to read the affidavits and reply thereto, unless plaintiff was willing to proceed with the hearing on the original motion and supporting affidavit. Counsel for the plaintiff agreed to proceed without the proffered affidavits being considered. Therefore, the affidavits were not considered by the Court on the hearing of the motion.

The purpose of the plaintiff's motion is to restrain the defendants "from making any distinction based upon color in regard to services at the Greenville Municipal Airport." The motion is based on the stated conclusion of the plaintiff, "that unless restrained by this court defendants will commit the acts referred to which will result in irreparable injury, loss and damage to plaintiff during the pendency of this action, as will more fully appear from the affidavit of plaintiff attached hereto and made a part hereof." The only acts attributed to any of the defendants in plaintiff's complaint are contained in paragraph 6 thereof. Therein it is stated, (a) "the manager of the Greenville Airport ordered plaintiff out, advising him that 'we have a waiting room for colored folks over there'; and (b) 'plaintiff informed him that he was in interstate traveler and that plaintiff believed that said manager's action was in violation of federal law and ICC regulations. Nevertheless, said manager insisted that plaintiff go. As a consequence plaintiff was required to be segregated.'"

[Affidavit Supporting Motion]

As noted above, plaintiff's motion for injunction is based upon his own affidavit. Omitting the formal parts of the affidavit the rest of it may be summarized as follows:

1. That he is the plaintiff in this case.
2. That he resides in the State of Michigan and is a citizen of the United States.
3. That he is a civilian employee of the United States Air Force at Selfridge Air Force Base in the State of Michigan.
4. That he was sent from Michigan to the Donaldson Air Force Base near Greenville, South Carolina.
5. That in preparation for his return to Michigan an official at the Donaldson Air Force Base procured air travel tickets for him on a flight schedule to leave Greenville Air Terminal Friday, November 7, 1958, at 5:21 P. M.
6. That one hour and one minute before the scheduled flight of his plane plaintiff went to the Greenville Air Terminal and selected and occupied a seat, for an hour's wait, in what he regarded as the white section of the waiting room there.
7. That "a man purporting to be the manager ordered plaintiff out, advising him 'we have a waiting room for colored folks over there.'" Whereupon "plaintiff informed him that he was in interstate traveler and that plaintiff believed that said manager's action was in violation of federal law and ICC regulations."
8. That it is plaintiff's opinion that he "will suffer great irreparable damage" if the preliminary injunction is not granted and that the reason for his apprehension is "that he reasonably expects during the course of his employment * * * that his travels will, on future occasions, take him to the Greenville Municipal Airport."
9. That the Greenville Airport Commission was created by an Act of the Legislature of the State of South Carolina in 1928, "for the purpose of establishing and maintaining aeroplane landing fields and county parks in the county of Greenville; and to make such rules and regulations as may be necessary in the conduct and operation of said aeroplane landing fields and county parks."

[Preliminary Injunction Unnecessary]

Plaintiff's affidavit as drawn makes it well-nigh impossible to segregate factual statements from surmises and opinions; but giving the affidavit most favorable consideration it falls short of indicating any necessity for a preliminary injunction to protect any legitimate right the plaintiff has. According to his affidavit and his complaint it is by no means certain that he will ever return to the Greenville Airport, although he surmises that he may return at some time in the future. The plaintiff speaks of discrimination without unequivocally stating any fact warranting an inference of discrimination. The nearest thing to an unequivocal statement in his affidavit is the asserted fact that the purported manager of the Greenville Air Terminal "advised him that 'we have a waiting room for colored folks over there.'" Preceding that statement plaintiff's

affidavit contains the bald assertion that the manager "ordered me out." However, the only words attributed to the manager by the plaintiff hardly warrant any such inference or conclusion. A like comment properly should be made concerning the further assertion in plaintiff's affidavit that he "was required to be segregated." What that loose expression means is anyone's guess. From whom was he segregated? The affidavit doesn't say. Was he segregated from his family or from his friends, acquaintances or associates, from those who desired his company and he theirs? There is nothing in the affidavit to indicate such to be true. Was he segregated from people whom he did not know and who did not care to know him? The affidavit is silent as to that also. But suppose he was segregated from people who did not care for his company or association, what civil right of his was thereby invaded? If he was trying to invade the civil rights of others, an injunction might be more properly invoked against him to protect their civil rights. I know of no civil or uncivil right that anyone has, be he white or colored, to deliberately make a nuisance of himself to the annoyance of others, even in an effort to create or stir up litigation. The right to equality before the law, to be free from discrimination, invests no one with authority to require others to accept him as a companion or social equal. The Fourteenth Amendment does not reach that low level. Even whites, as yet, still have the right to choose their own companions and associates, and to preserve the integrity of the race with which God Almighty has endowed them.

[Color of Law Not Alleged]

Neither in the affidavit nor in the complaint of the plaintiff is there any averment or allegation that whatever the defendants may have done to the plaintiff was done at the direction or under color of state law. It is nowhere stated in either what right the plaintiff claims was denied him under color of state law. A state law was passed in 1928 that "created a Commission * * * to be known as Greenville Airport Commission." That Commission consists of five members, two selected by the City Council of the City of Greenville, two by the Greenville County Legislative Delegation, and the fifth member by the majority vote of the other four. The Commission so created is "vested with the power to receive any gifts or donations from any source, and also to hold and enjoy property, both real and personal,

in the County of Greenville, * * * for the purpose of establishing and maintaining aeroplane landing fields * * *; and to make such rules and regulations as may be necessary in the conduct and operation of said aeroplane landing fields." (Emphasis added) Further, the Act authorizes "The City of Greenville * * * to appropriate and donate to said Commission such sums of money as it may deem expedient and necessary for the purposes aforesaid." There is nothing in the Act that requires the Commission to maintain waiting rooms of any sort, segregated or unsegregated.

There is nothing in the affidavit or complaint of the plaintiff which could be tortured into meaning that the defendants had denied the plaintiff the use of the authorized airport landing fields. He had a ticket which authorized him to board a plane there. He was not denied that right. In fact there is no clear cut statement of any legal duty owed the plaintiff that defendants breached; and there is no showing that the plaintiff was damaged in any amount by anything done by the defendants, or by any one of them, under color of state law.

The motion for a preliminary injunction should be denied.

DEFENDANTS' MOTIONS TO STRIKE

When these motions were called for hearing, plaintiff's counsel, in response to an inquiry by the Court, stated that this court's jurisdiction of the instant case "is primarily predicated on Title 28, U. S. Code, Section 1343, which provides that 'The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.'"

The motion to strike paragraphs 1(a), 1(c), 2 and 5 of the complaint will be considered in the light of plaintiff's stated jurisdictional position. So the question here is, Shall the designated paragraphs be struck on the ground that upon the face of them they are immaterial? Paragraph 1(a) invokes the jurisdiction of this court under the provisions of Section 1331, Title 28, U. S. Code. It provides that district courts "shall have

original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000.00, exclusive of interest and costs, and arises under the constitution, laws or treaties of the United States." Under this Section two conditions must concur to establish jurisdiction. First, the matter in controversy must exceed the sum or value of \$10,000.00; and, second, the claim asserted must arise under the constitution or laws of the United States. There is not a single well pleaded fact that warrants the inference that the matter in controversy exceeds the value of \$10,000.00, exclusive of interest and costs. There is no allegation in the complaint that plaintiff was put to any extra expense or that he was humiliated or degraded in the presence of others by anything done by the defendants or any of them. Accepting his word for it, the only person with whom the plaintiff had any dealings at the time alleged in the complaint was a person to whom he referred as the "purported manager" of the Greenville Airport, and to him is ascribed these words, "we have a waiting room for colored folks over there." How anyone could say that such a remark addressed by one person to another could possibly injure the person addressed more than the amount of \$10,000.00 is inconceivable. Besides, plaintiff's complaint points to no injury he sustained, and, claiming no injury, he could not legitimately place a value of more than \$10,000.00 on it. If the Court should supply the inference that he was damaged in some way to some extent, not an unusual procedure in some courts on occasions, it would still be left to speculation as to what is the actual amount in controversy. The mere fact that the controversy presented arises under the constitution or laws of the United States, if that should be accepted as a fact, would not be sufficient to establish the court's jurisdiction. There would still exist the insurmountable obstacle of lack of the jurisdictional amount in controversy.

[Jurisdictional Amount Not Alleged]

Paragraph 1(c) of the complaint, which defendants also ask the Court to strike, invokes the jurisdiction of the Court under Section 1332, Title 28, U. S. Code. Jurisdiction under this Section cannot be invoked, even if diversity is shown, since the amount in controversy is not in excess of \$10,000.00, exclusive of interest and costs. Here again jurisdiction fails because the

requisite jurisdictional amount is not in controversy. Plaintiff doesn't even ask that he be awarded damages in any amount, much less in an amount in excess of \$10,000.00, exclusive of interest and costs.

Paragraph 2 of the complaint alleges nothing more than that the action is brought pursuant to Rule 23(a)(3) of Federal Rules of Civil Procedure on behalf of the plaintiff and all other negroes similarly situated, without even alleging that there are others similarly situated. About himself the plaintiff says, he is a resident of the State of Michigan, a citizen of the United States, a civilian employee of the Government, with a civil service rating, and that he may some day return to the Greenville Airport. And all that he alleges about a class action is that he "brings this action pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure for himself and on behalf of all other negroes similarly situated, whose number make it impracticable to bring them all before the court; they seek common relief based upon common questions of law and fact".

There is no allegation in the complaint that the defendants have ever done or threatens to do anything that is actionable to any negro other than the plaintiff. Moreover, there is no allegation that other negroes have been accorded unequal treatment at the Airport, that the defendants are impecunious, or that, for any other reason, they cannot be made to respond in damages for any civil wrong that they, or any of them, may have done or may hereafter do to the plaintiff or to any other negro.

The most that can be said of this case as a class action is, that it belongs to that class sometimes denominated "Spurious Class Suits"; and, since no other negro has asked to be made a party to it, this action can be classed as nothing more than a suit by the plaintiff for the benefit of himself. The instant case is quite similar to *Jinks, et al. v. Hodge*, 11 F. R.D. 346, the big difference being that the cited case was for injunctive relief and to recover for a tort, while the instant case is solely for an injunction. Judge Darr held the *Jinks* Case to be "what Professor Moore in his *Federal Practice* calls a Spurious Class Suit, which is a permissive joinder device", adding that:

"No persons other than the named plaintiffs have intervened and this leaves the suit solely by the named plaintiffs. The named

plaintiffs do have a question of law or fact common to others similarly situated but the right of each is distinct. The suit based upon this portion of the Civil Rights Act, which finds life from the First Section of the Fourteenth Amendment, unquestionably gives a personal right of action to a citizen of the United States. Therefore, the complaint is entirely insufficient for the relief claimed".

The motion to strike paragraph 5 of the complaint is the last of defendants' multiple motion to strike. All that is alleged in this paragraph is, that plaintiff is informed and believes that the defendants received contributions from the Government from time to time "for the purpose of constructing substantial portions of and maintaining operations at the Greenville Municipal Airport". Just what the Government's giving or failing to give something to encourage the construction of an airport has to do with a litigant's claim that he has been deprived of a civil right under color of state law, I fail to see. The allegations of paragraph 5 are clearly immaterial.

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

This motion is made under Rule 12(b)(1) and (6), Federal Rules of Civil Procedure. It is predicated, first, upon the ground that this court lacks jurisdiction over the subject matter of the action; and, second, on the ground that the complaint fails to state a claim upon which relief can be granted.

The jurisdiction of this court is invoked by the plaintiff under Section 1343, Title 28, U. S. Code. It is appropriate, therefore, that we consider the extent of the jurisdiction that is therein conferred on this court. By it district courts are given jurisdiction of civil actions " * * * to redress the deprivation, under color of state law, * * * of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens * * *". Hence we must look to the complaint to ascertain (1) what right plaintiff claims he has been deprived of, (2) secured by what constitutional provision or Act of Congress providing for equal rights of citizens, and (3) under color of what state law? It is not enough for the plaintiff to allege that he has been deprived of a right or a privilege. He must go further and show what right, or privilege, he has

been deprived of, by what constitutional provision or Act of Congress it is secured, and under color of what state law he has been deprived of his stated right. If the plaintiff fails to allege any one or more of the specified elements his action will fail as not being within the jurisdiction of this court.

[No State Law Authorizing Action]

As pointed out hereinabove, there is no allegation in the complaint that anything complained of was done under color of a specified state law. The Court has been pointed to no state law requiring the separation of the races in airport waiting rooms, and its own research has developed none. Moreover, there is no state law that has been brought to the Court's attention, or that it has discovered, which requires the defendants, or anyone else, to maintain waiting rooms at airports, whether segregated or unsegregated. Hence the advice which it is alleged that the "purported manager" of the Airport gave the plaintiff, saying, "we have a waiting room for colored folks over there", could not have been given under color of a state law since there is no state law authorizing or commanding such action.

In connection with the tendered issue of the court's jurisdiction, plaintiff claims that he has a cause of action arising under Section 1981, Title 42, U. S. Code. It provides:

"All persons within the jurisdiction of the United States shall have the same right in every state * * * to the full and *equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens*, and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind * * *". (Emphasis added)

The undoubted purpose of Congress, in enacting Section 1981, was to confer on negro citizens rights and privileges equal to those enjoyed by white citizens and, at the same time, to impose on them like duties and responsibilities. The Court's attention has been directed to no law that confers on any citizen, white or negro, the right or privilege of stirring up racial discord, of instigating strife between the races, of encouraging the destruction of racial integrity, or of provoking litigation, especially when to do so the provoker must travel a great distance at public expense.

["Volunteer Trouble Makers" Disfavored]

It is inferable from the complaint that there were waiting room facilities at the Airport, but whether those accorded the plaintiff and other negroes were inferior, equal or superior to those accorded white citizens is not stated. It is also inferable from the complaint that the plaintiff did not go to the waiting room in quest of waiting room facilities, but solely as a volunteer for the purpose of instigating litigation which otherwise would not have been started. The Court does not and should not look with favor on volunteer trouble makers or volunteer instigators of strife or litigation. A significant feature of Section 1981, which by some is little noticed and often ignored, is that it places squarely on negroes obligations, duties and responsibilities equal to those imposed on white citizens, and that said Section does not confer on negroes rights and privileges that are superior and more abundant than those accorded white citizens.

Williams v. Howard Johnson's Restaurant, et al, argued before the Fourth Circuit Court of Appeals June 15, 1959, is in many respects similar to the instant case. As here, the plaintiff had a government job. He went from his place of public employment into the State of Virginia to demand that he be served in a restaurant known to him to be operated by its owner, the defendant, solely for white customers. He invoked the jurisdiction of the court both on its equity side and on its law side for himself and for other negroes similarly situated. The suit was dismissed by the district court. Upon the hearing it was conceded that no statute of Virginia required the exclusion of negroes from public restaurants. Hence the Fourteenth Amendment didn't apply. No action was taken by the defendant under color of state law. Notwithstanding the absence of a state law applicable to the situation, the plaintiff argued that the long established local custom of excluding negroes from white restaurants had been acquiesced in by Virginia for so long that it amounted to discriminatory state action. The Appellate Court disagreed, and so do I. As pointed out in Judge Soper's opinion in the Howard Johnson case, "This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own

desires and social practices". Further Judge Soper said:

"The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelly v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 842 [92 L.Ed. 1161]:

" 'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is *only such action as may fairly be said to be that of the States*. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' " (Emphasis supplied)

[Extent of Personal Rights]

To say that the right of one person ends where another's begins has long been regarded as a truism under our system of constitutional government. While the rights and privileges of all citizens are declared to be equal by our constitution there is no constitutional command that they be exercised jointly rather than severally; and, if there were such a constitutional command, the rights and privileges granted by the constitution would be by it also destroyed. A constitution so written or interpreted would be an anomaly.

It is concluded that, for reasons stated, the complaint should be dismissed and this case ended. An order for final judgment, in conformity with this opinion, will be signed on presentation.

This 4th day of August, 1959.

ORDER

The above entitled action was heard by me on July 20, 1959, on motions of the plaintiff and the defendants. After hearing arguments by counsel for both parties, this Court denied the plaintiff's motion for preliminary injunction and granted the motions of the defendants, the reasons for which are fully set out in the written opinion of this Court dated August 4, 1959.

IT IS THEREFORE ORDERED that the plaintiff's motion for a preliminary injunction be

and the same is hereby denied and the defendants' motions to strike paragraphs 1(a), 1(c), 2 and 5 of the complaint and to dismiss the

complaint be and the same are hereby granted.
IT IS SO ORDERED.
September 8th, 1959.

GOVERNMENTAL FACILITIES Golf Courses—Florida

Frank HAMPTON, D. W. Welcome, and A. R. Richardson v. the CITY OF JACKSONVILLE, a Municipal Corporation; its Officers, Employees, Agents, and Servants.

Fourth Judicial Circuit, Duval County, Florida, November 24, 1959, No. 59-3374-E, Division "C."

SUMMARY: Certain Jacksonville, Florida, taxpayers sought in circuit court a declaratory judgment respecting, and an injunction prohibiting, the sale of two golf courses by the city. The city had operated the courses as public recreational facilities, but just prior to the effective date of a federal district court injunction prohibiting discrimination against Negroes in the use of the courses, the City Commission ordered them closed on the ground that their integration would cause such a revenue decrease that the city could not afford to operate them. The city council then offered these premises for sale on condition that they be used only for golf courses. No bids being received at the appraised values of \$496,000 and \$606,000 (with use restricted for only ten years), they were re-advertised, and bids of \$260,000 and \$366,001 were accepted by the commission, on condition that the property would revert if used as other than golf courses within twenty-one years. Plaintiffs' contention that the courses could not be sold without special legislative authorization was rejected, the court distinguishing decisions involving leases to private persons of property being used for municipal purposes. The court also overruled the argument that the city could not sell properties purchased and held in trust for public purposes for less than the appraised values because that would amount to a gift to private individuals; it held, rather, that the operation of recreational facilities, though declared by the legislature to be a public purpose, is not a governmental function which the city was compelled to perform, and that the city was free to dispose of the golf courses even at less than appraised value in the absence of a showing of illegality, fraud, or abuse of authority. The city's right to sell them for restricted use only was upheld, even though a higher price could have been obtained by an unrestricted sale, and the consideration was held not to be so inadequate as to show abuse of authority or discretion, the city having accepted the highest and best bid offered on its terms.

McNATT, Circuit Judge.

FINAL DECREE

Alleging themselves to be taxpaying citizens of the City of Jacksonville, Plaintiffs seek a Declaratory Decree respecting, and consequent injunction prohibiting, the sale by the City of municipally owned properties known as The Brentwood Golf Course and The Hyde Park Golf Course. Neither the right of the Plaintiffs to maintain the action nor the jurisdiction of the Court in the premises is questioned.

By agreement of the parties the case was ex-

pedited and was tried on November 13th and 14th, 1959. At the beginning of the trial, the parties agreed that so-called "Civil rights" were not involved, and the Court sustained the Defendant's motion to strike the second paragraph of Paragraph 10 of the Complaint, and denied the remainder of its motion.

FINDINGS

On the pleadings, the evidence submitted, and the admissions of the parties in open Court, the material facts are:

(a) The Brentwood Golf Course is located

within the City Limits at Golfair Boulevard and Moncrief Road. It consists of approximately 129.84 acres of land purchased by the City, and is now a complete 18-hole golf course, with furnished Club-house, accessory buildings and equipment. The City proposes to sell it for the total sum of \$260,000.00, with a down payment of \$25,000.00, the balance being payable in installments, with interest at 5% per annum, over a twenty year period.

(b) The Hyde Park Golf Course is located outside (approximately 1½ miles Southwest) of the City limits at Hyde Park Road and Niblick Drive. It consists of approximately 133.74 acres of land purchased by the City, and is now a complete 18-hole golf course, with furnished Club-house, accessory buildings and equipment. The City proposes to sell it (excepting .625 acres) for the total sum of \$366,001.00, with a down payment of \$25,001.00, the balance being payable in installments, with interest at 5% per annum, over a twenty year period.

(c) Prior to April 6, 1959, the City had operated both golf courses as public recreational facilities. On April 1, 1959, the United States District Court enjoined the City from refusing to allow negroes to use the golf courses upon the same basis as white persons were permitted to use them. The effective date of the injunction was April 7, 1959, and on April 2, 1959, the City Commission "temporarily" closed the golf courses effective April 6, 1959. At the time, negro golfers were using both golf courses one-seventh (1/7th) of the time and the revenue derived from negro golfers amounted to one-twenty-sixth (1/26th) of the total revenue. The Commissioner in charge was of the opinion that "integration" of the golf courses would cause such a decrease in revenue that the City would be forced to cease operation of them.

(d) The golf courses remained closed, and on August 11, the City Council (by Ordinance, concurred in by the City Commission) determined that they would no longer be operated, that they were surplus to the needs of the City, and should be offered for sale upon the express condition that the properties should be continually maintained and used only for golf courses. Under the plan, appraisals were to be secured and the properties advertised for sale. Easements and rights for utility and drainage purposes and for the Municipal radio station were to be reserved. Appraisals were secured and the Brentwood Course was valued at

\$496,000.00, and the Hyde Park Course at \$606,000.00. The values placed on the properties by the appraisers were strictly "golf course values", and the appraisals were made on the basis that the purchasers would be required to maintain and use the property as golf courses for a period of ten (10) years only.

(e) Pursuant to the Ordinance referred to in Paragraph (d), the golf courses were advertised for sale in newspapers of general circulation, the advertisements stating that sealed bids would be received on September 22, 1959. The advertisement relating to the Brentwood course stated that no proposal for less than \$496,000.00 would be considered, and the advertisement relating to the Hyde Park Course stated that no proposal for less than \$606,000.00 would be considered. No bid having been received on either course on or before September 22, 1959, the City Commission determined to readvertise the properties for sale with the requirement for minimum bids eliminated. The properties were readvertised in a newspaper of general circulation, the advertisements stating that sealed bids would be received on October 6, 1959, and requiring the bidder to state the total purchase price to be paid and the terms of payment.

(f) On October 6, 1959, the City Commission received the bid of \$260,000.00, referred to in Paragraph (a) and also a bid of \$193,000.00 for the Brentwood Course. It received the bid of \$366,001.00 referred to in Paragraph (b) and also a bid of \$306,050.00 for the Hyde Park Course. The low bids proposed even smaller down payments than did the high bids. On November 10th, 1959, the City Commission accepted the said bid of \$260,000.00 which was made by Robert C. Lechner for the Brentwood Course, and the said bid of \$366,001.00 which was made by D. C. Dawkins, Jr., for the Hyde Park Course, and authorized and requested the City Attorney to prepare and submit to the City Council the necessary ordinance to provide for each of the proposed sales.

(g) Under the terms and conditions of the proposed sales, each deed is to contain the following:

"This conveyance is made upon the express condition that the property hereby conveyed shall be continuously maintained by the Grantee, its (*his*) successors (*heirs*) and assigns, as a golf course and shall be used only for the purpose of a golf course;

and if said property be not so maintained or should it be diverted to other use, said property shall immediately revert to the Grantor, its successors or assigns * * * .

(h) Less than one-half (½) of the (1) percent of the Citizens of Jacksonville use the golf courses; and during the last four full years (1955-1958) that they were operated, expenditures by the City on the golf courses exceeded revenues received from them by \$250,089.00, so that over one-quarter million dollars of tax money was expended in the operation of the golf courses during said four-year period.

PROVISIONS OF CITY CHARTER

The pertinent provisions of the Charter of the City of Jacksonville are *Section 6* and *Section 605* and they provide:

"Sec. 6. Powers of city generally.

Said corporation shall have perpetual succession, shall sue and be sued, plead and be impleaded, may purchase, lease, receive and hold property, real and personal, within said city; and may sell, lease or otherwise dispose of the same for the benefit of the city; and may purchase, lease, receive and hold property, real and personal, beyond the limits of the city, to be used for the burial of the dead; for the erection of waterworks; for the establishment of poor-houses, pest houses, houses of detention and correction; for the public parks and promenades, and for any other public purpose that the Mayor-(commissioner) and City Council may deem necessary or proper; and may sell, lease or otherwise dispose of such property for the benefit of the city to the same extent as natural persons may. * * * . (Acts 1887, ch. 3775, art. 1, Sec. 2)"

"Sec. 605. Sale of real estate belonging to city — Joint concurrence by Commission and Council.

That from and after the passage of this Act, no sale of real estate belonging to the City of Jacksonville shall be made without the joint concurrence of the City Council and the City Commission of said city. All deeds and other conveyances of such real estate shall be authorized by ordinance duly passed by the City Council and approved by the Mayor-(commissioner) and the City Commission of said city. (Acts 1943, ch. 22349, Sec. 1.)"

Section 6 supplies the power to sell and *Section 605* prescribes the procedure in making sales of City property. According to the statement of the City Attorney in Open Court, the ordinance required by *Section 605* will be submitted to the City Council on November 24th, 1959.

OPINION AND DECISION

In their brief and oral argument, the Plaintiffs contend that the City may not sell the golf courses without special legislative authorization, and that it may not sell them for less than their appraised values as golf courses. They assert that the properties were purchased and are held for public purposes, that they are held in trust for the people, and that the proposed sales for less than appraised values constitute "a gift of public property to private individuals". Even though the Plaintiffs concede that no question of denial of their constitutional rights is presented for decision, they argue that the golf courses were "closed to avoid an Order" of the Federal Court which would have required "integration" as a condition to continued operation.

The Court is not concerned with the reasons which may have prompted the elected officials of the City to close the golf courses. This is so because the operation by the City of luxury or other recreational facilities (even though declared by the legislature to be a public purpose) is not a governmental function, *McQuillin, Municipal Corporations*, Vol. 18, page 466, and the City is not compelled to operate them. Being under no legislative mandate or other compulsion to operate the golf courses, the City had the right to close them. *Griffis vs. City of Fort Lauderdale (Fla.)*, 104 So.2d 33; *Tonkins vs. City of Greensboro (U.S.D.C.)* 162 F.Supp. 549.

In support of their contention that the City may not sell the golf courses in the absence of express legislative authorization, Plaintiffs cite a number of decisions, including *City of Daytona Beach vs. Dygert*, 146 Fla. 352, 1 So.2d 170, and *City of Clearwater vs. Caldwell (Fla.)* 75 So.2d 765. Both cases involved leases of property being used for Municipal purposes to private individuals, and neither they nor the other authorities relied upon by the Plaintiffs are authority for the proposition that the City of Jacksonville cannot "sell and thus permanently dispose of" the golf courses under the general powers contained in its Charter. *City of Clear-*

water vs. Caldwell, supra; Griffis vs. City of Fort Lauderdale (Fla.) 104 So.2d 33; Bailey vs. City of Tampa (Fla.) 111 So. 119; Clearly vs. Dade County (Fla.) 37 So.2d 248; American Jurisprudence, Vol. 38 page 165, Section 3487 on Municipal Corporations.

On the Plaintiffs' proposition that the City may not sell the golf courses for less than the value placed thereon by the appraisers, the rule is that the Courts should not interfere unless there is a showing of illegality, fraud or abuse of authority. Bailey vs. City of Tampa (Fla.) 111 So. 119; McQuillin, Municipal Corporations (3rd Ed.) Vol. 18, page 103; Rhyne, Municipal Law, (1957 Ed.), page 381. The fact that the City proposed to sell its golf courses has been widely publicized in newspapers of general circulation, and there has been no restriction as to the parties who might submit bids. As only two bids were received for each of the golf courses, it is obvious that there is little demand for and that few persons are willing to risk investments in property of this nature. If they were true bargains or, in effect, were being disposed of at "give-away prices", it is reasonable to suppose that the Plaintiffs or other interested persons would have submitted additional bids.

In this connection, the evidence shows that as they were being operated by the City, the golf courses were a liability and a substantial burden on the taxpayers of the City, and that there was opposition by those using the courses to increase in the charges made by the City. In addition, the evidence clearly indicates that upon sales to private interests, substantial increase in the charges being made by the City at the time the courses were closed may be expected, because (1) *private owners must pay taxes on the properties*, and (2) *they will expect to receive a reasonable return on and eventually recoup their investments*.

Under these circumstances, the contentions of the Plaintiffs that the properties should have been offered for sale without the restriction that they be used for golf courses and that they should not be sold for less than the appraised values of the lands alone are not illogical. However, these are arguments which must be addressed to the elected officials of the City, because it is not the province of the Court to pass upon the wisdom or the folly of the proposed sales. On the contrary and as above indicated, the Court must limit its consideration to the question of whether there has been a showing of

illegality, fraud or abuse of authority. The Court may not substitute its judgment for the judgment of the elected officials, and thus play the role of the potter in shaping the decision of the City as to the advisability, terms and conditions of the proposed sales.

The above mentioned restrictions that the properties be *used only for golf courses* are not unlawful, and may be treated as a part of the consideration for the sales. Babb vs. Green (S.C.) 73 S.E.2d 699; Schatz vs. City Council (N.D.) 61 N.W.2d 423. And though the reverter clause will be valid for twenty-one (21) years only, yet the restrictions do not terminate and may be enforced and violation thereof restrained by a Court of competent jurisdiction upon the petition of any party adversely affected. Chapter 689.18, Florida Statutes.

There has been no suggestion of fraud or collusion in the proposed sales. The only suggestion of illegality is that the City does not have the power to sell in the absence of special legislative authorization, and the point has been decided contrary to the contentions of the plaintiffs. As to the asserted abuse of authority because of the inadequacy of the consideration in each of the proposed sales, the fact is that the City Commission has accepted the highest and best bid made. In Griffis vs. City of Fort Lauderdale (Fla.) 104 So. (2d) 33, the record shows that the City procured an appraisal of approximately one million (\$1,000,000.00) dollars on its golf course and sold it to the highest and best bidder for five hundred sixty-two thousand four hundred (\$562,400.00) dollars. In that case, both the Trial Court and the Supreme Court refused to interfere with the action of the officials of the City. On the basis of Griffis decision and the evidence presented in this case, this Court should not decide that the consideration for which the City of Jacksonville proposes to sell the Brentwood and Hyde Park golf courses is so inadequate as to show abuse of discretion.

Upon the facts found and the law as applied to facts, it is ORDERED, ADJUDGED AND DECREED:

1. The City of Jacksonville has ceased to operate public golf courses, and has declared the properties purchased by it and known as The Brentwood Golf Course and The Hyde Park Golf Course to be surplus to its needs.

2. Under its Charter, the City of Jacksonville has the authority to sell surplus property to the highest and best bidder, and to restrict the use

of property sold to any lawful use, and any such restriction will be valid and binding to the extent provided in Chapter 689.18 (4) (7), Florida Statutes.

3. The injunctions sought should be, and the same are, hereby denied.

DONE AND ORDERED at Jacksonville, Florida, this 24th day of November, 1959.

GOVERNMENTAL FACILITIES Parks—Alabama

Georgia Theresa GILMORE, Gussie Carlton, Sylvia Johnson, J. C. Smith, Mattie Cargill, Fred Harris, George Stephens, Elizabeth Brown, on behalf of themselves and all others similarly situated v. CITY OF MONTGOMERY, Alabama, Board of Commissioners of the City; W. A. Gayle, Frank W. Parks and Clyde C. Sellers, as Members of the Board of Commissioners; Park and Recreation Board of the City; Mrs. James Fitts Hill, Father M. J. Rafferty, Rev. Louis Armstrong, Florian Strassburger, and Jack Hope, as Members of the Park and Recreation Board; T. A. Belser, As Superintendent of the Parks and Recreational Program.

United States District Court, Middle District, Alabama, Northern Division, September 9, 1959, 176 F.Supp. 776.

SUMMARY: Negro citizens of Montgomery, Alabama, brought a class action in federal district court against city officials seeking a judgment declaring unconstitutional both an ordinance which makes it a misdemeanor for white and colored persons to enter or use public parks except those assigned to their respective races, and defendants' practice, custom, and usage of denying Negroes permission to use city parks designated for use by white people only, and an injunction against operating parks on a basis of racial segregation. The court found that the city through its officials had adopted and enforced until January 1, 1959, a policy, practice, custom and usage of enforced segregation in its parks; that plaintiffs had unsuccessfully petitioned defendants for discontinuation of park segregation and for permission to use any of the parks; that after this action was filed the city commissioners as of January 1, 1959, closed the parks to the public, both white and Negro, "until further action of the Parks and Recreation Board and the Mayor and Commissioners" [4 Race Rel. L. Rep. 206 (1959)]; but that the parks continued to be maintained so that the city was free to reopen them at any time it sees fit. The ordinance and the policy, practice, custom, and usage complained of were declared unconstitutional under the Fourteenth Amendment for denying plaintiffs and their class equal protection. The court pointed out that the city was not required to operate parks and could keep them closed as long as it saw fit, but held that when and if they are reopened, they must be nondiscriminatorily available for all the public regardless of race. The injunctive relief requested was also granted, the court saying that it was reasonable to assume that in the absence of such relief the parks would be reopened and operated upon the same basis as before.

JOHNSON, District Judge.

MEMORANDUM OPINION

This is an action commenced by the above-named plaintiffs on behalf of themselves as Negro citizens of the City of Montgomery, Alabama, and other Negro citizens similarly situated, seeking a judgment declaring that Ordinance

No. 21-57 of the City of Montgomery, Alabama and the policy of the above-named defendants, their practice, custom, and usage of denying to these Negro plaintiffs and the members of the class they represent permission to use the several public parks owned, operated, supervised,

and maintained by the City of Montgomery, Alabama, while at the same time extending and granting to white persons the right, privilege, and admission to and use of these public parks, deprive these persons and members of their class of their constitutional rights as secured by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs also seek an injunction prohibiting the operation of said public parks on a basis that requires segregation solely because of race or color.

This action is now submitted to the Court upon the pleadings and the exhibits thereto, the stipulations entered into by and between the parties and dictated into the record, the oral testimony taken before the Court, and the briefs and arguments of the parties. Upon this submission, this Court now proceeds in this memorandum opinion to make the appropriate findings of fact and conclusions of law.

Each of the plaintiffs is a Negro citizen of the City of Montgomery, Alabama, and each is a citizen of the United States. Each of the plaintiffs has for a considerable number of years lived in the City of Montgomery, Alabama, and has had available for use and has used only the recreational parks designated for the use of Negro citizens. They have not used nor had available for their use those parks designated for use by the City of Montgomery for white people only, except in their capacity as maids and/or servants. Each of the plaintiffs desires to use and would find it convenient to use one or more of the recreational parks set aside by the City of Montgomery for the use of white persons only. In several instances, the parks designated for use by whites are more readily accessible to plaintiffs than those parks designated for the use of the Negroes.

The City of Montgomery owns, maintains, and until January 1, 1959, operated Bear Park, Bruce Field Park, Civic Park, Day Street Park, Diffly Park, Hamner Hall Park, Kings Hill Park, Kiwanis Park, Mobile Heights Park, Oak Park, Perry Street Park, Ridgcrest Park, Washington Park, and Trenholm Court Park. Of these parks, Washington Park, Kings Hill Park, Trenholm Court Park, and Mobile Heights Park were designated by the City of Montgomery, acting through its officials, exclusively for the use of Negro citizens. All the other named parks were designated exclusively for the use of white citizens.

The City of Montgomery, at the time plaintiffs filed their suit and since June 4, 1957, had as one of its ordinances the ordinance designated in this case as Ordinance No. 21-57.¹ This ordinance makes it a misdemeanor, subject to fine and imprisonment, for any person, white or colored, to enter upon, visit, use, or in any way occupy public parks, or other public houses or public places . . . except those assigned to their respective races.

The plaintiffs filed their complaint on December 22, 1958, after having petitioned the Park and Recreation Board for the City of Montgomery to discontinue the policy, practice, custom, and usage of denying to Negro citizens admission to and the use of any of the public parks owned, operated, supervised, and maintained by the City of Montgomery. This petition was acknowledged by the chairman of the Park and Recreation Board on August 25, 1958, by referring petitioners to the "ordinances of the City of Montgomery." Subsequent to that time, petitioners, together with other members of their

1. "AN ORDINANCE NO. 21-57. BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY, as follows:

"Section 1. It shall be unlawful for white and colored persons to enter upon, visit, use or in any way occupy public parks or other public houses or public places, swimming pools, wadding pools, beaches, lakes or ponds except those assigned to their respective races.

"Section 2. It shall be unlawful for any person, who, being the owner, proprietor, keeper or superintendent of any public park or other public houses or public places, swimming pool, beach, lake or pond to allow or knowingly permit white and colored persons to enter upon, visit, use or in any way occupy a public park or other public houses or public places, swimming pool, wadding pool, beach, lake or pond, except those assigned to their respective races.

"Section 3. The words 'colored persons,' as used herein, shall have the same meaning as 'person of color' as defined in Section 2 of Title 1 of the 1940 Code of Alabama.

"Section 4. Any person, firm, corporation or association violating any of the provisions of this ordinance shall be guilty of a misdemeanor against the City of Montgomery, and upon conviction shall be subject to a fine of not more than One Hundred Dollars, and imprisonment for not more than six months, one or both at the discretion of the City Recorder.

"Section 5. The provisions of this ordinance are severable, and should any sentence, paragraph, section or clause of this ordinance be declared unconstitutional by any Court of competent jurisdiction, then such action by said Court shall not affect the other provisions of this ordinance which are otherwise constitutional.

"Section 6. Public Health and Public Welfare demanding it, this ordinance shall take effect immediately upon its passage."

race, requested the Board of Commissioners of the City of Montgomery, Alabama, to permit them the use of any of the public parks owned, operated, and maintained by the City of Montgomery. That request was acknowledged by the City Commissioners on September 17, 1958, the Commissioners then stating, "The Commission will not operate integrated parks."

After plaintiffs filed this action and effective January 1, 1959, all the above-named public parks in Montgomery, Alabama, were by resolution of the City Commissioners closed to all members of the public, both white and Negro. This action was effective January 1, 1959, and has continued to this date.² The City of Montgomery, Alabama, continues to own and maintain each of the above-named parks, even though they are closed, and continues to keep on its payroll certain of the parks' officials and employees, including the Superintendent of Parks and Recreation, who, according to the testimony, is the Chief Administrative Officer for the Park and Recreation Board, and who testified that he had been furnished by the City Commission with a copy of the ordinance in question, and who further testified there was no "present intention to reopen the parks during the present term of the incumbent Commissioners", and who further testified that in the event Negroes had presented themselves for admission to those public parks designated for use by white only prior to the time the parks closed that he would have called the police and would have enforced the ordinance to the best of his ability.

2. The pertinent portions of that resolution are:

"WHEREAS, eight negroes, namely, Georgia Theresa Gilmore, Cussie Carlton, Sylvia Johnson, J. C. Smith, Mattie Cargill, Fred Harris, George Stephens, and Elizabeth Brown, have attempted to compel the integration of Oak Park and other public parks in the City of Montgomery hereinafter designated, by suit filed in the Federal District Court; and

"WHEREAS, this attempt poses grave problems involving the welfare and public safety of all of the citizens of the City of Montgomery; and

"WHEREAS, the members of the Commission are of the opinion that it is to the best interest of the citizens of Montgomery that said parks be closed:

"NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the City of Montgomery, Alabama, that the following public parks in the City of Montgomery, to-wit, * * * be closed beginning January 1, 1959, to all persons, regardless of color, until further action of the Parks and Recreation Board and the Mayor and Commissioners of the City of Montgomery."

This Court further finds that the City of Montgomery, Alabama, even though it closed all parks to all persons irrespective of race or color, has not repealed Ordinance No. 21-57; the City of Montgomery, as sole owner and in sole control of said parks that are now being maintained and kept up, is free to reopen any or all of the parks at any time it sees fit, and, as a matter of fact, the closing of the parks was "pending further action of the Parks and Recreation Board and the Mayor and Commissioners of the City of Montgomery."

The evidence in this case reflects only one instance of a Negro being arrested for trespassing upon a park area that was designated for use by the whites. However, it is clear from all the testimony and the exhibits that the City of Montgomery, Alabama, acting through its City Commissioners and its Park and Recreation Board, had adopted and was enforcing during the time these parks were operated and on up until they were closed on January 1, 1959, a policy, practice, custom, and usage of enforced segregation in these parks.

This Court concludes that it has jurisdiction of this matter and that this action is properly brought by these plaintiffs as a class action. See *Frasier v. Board of Trustees of the University of North Carolina*, 134 F.Supp. 589, affirmed 350 U.S. 979. This Court further concludes that Ordinance No. 21-57, adopted by the City of Montgomery, acting through its Board of Commissioners on June 4, 1957, which ordinance makes it a misdemeanor for white and colored persons to enter upon, visit, or use, or in any way occupy public parks except those assigned to their respective races, is unconstitutional. See *Holmes v. City of Atlanta*, 124 F.Supp. 290, 223 F.2d 93, and 350 U.S. 879. Also see *Moorhead v. City of Ft. Lauderdale*, 152 F.Supp. 131, 248 F.2d 544; *Ward v. City of Miami*, 151 F.Supp. 593; *City of St. Petersburg v. Alsop*, 238 F.2d 830, and *Tate v. Department of Conservation and Development, etc.*, 133 F.Supp. 53, 231 F.2d 615, and 352 U.S. 838.

This Court further concludes that the policy, practice, custom and usage of denying to these Negro plaintiffs and members of the class they represent the right and privilege of admission to and use of any of the public parks owned, operated, supervised, and maintained by the City of Montgomery is a denial of these plaintiffs and members of the class they represent the equal protection of the laws as secured to

them by the Fourteenth Amendment to the Constitution of the United States and such practice, policy, custom and usage is, therefore, unconstitutional.

This Court further concludes that since the defendants continue to maintain the unconstitutional ordinance and until after this litigation was filed continued to follow the unconstitutional custom, practice and usage with respect to the use of the parks by all races, and since the City of Montgomery continues to own and maintain these parks and is free to resume this unconstitutional practice and custom and to resume the enforcement of the unconstitutional ordinance, the plaintiffs are entitled not only to the declaratory relief they ask for but also to the injunctive relief they herein seek;³ this is true even though the parks are closed at the present time. As a matter of fact, it is only reasonable to assume from all the testimony (or lack of it) that unless this Court grants to these plaintiffs the relief they now seek, the parks will again be reopened and operated upon the same basis as before. See *United States v. Hamburg-American Co.*, 239 U.S. 466; *United States v. W. T. Grant Co.*, 345 U.S. 629, and cases cited therein; *Walling v. Helmerich & Payne*, 323 U.S. 37; *Bogges v. Berry Corporation*, 233 F.2d 389; *Lawrence v. Hancock*, 76 F.Supp. 1004; and *Tate v. Department of Conservation and Development*, *supra*. See also *Avery v. Wichita Independent School District*, 241 F.2d 230, cert. den. 353 U.S. 938.

It should now be made clear that all this Court now holds is simply that insofar as is legally required the City of Montgomery, Alabama, need not operate any public parks or make available to its citizens any recreational facilities; all public parks and all recreational facilities may remain closed for as long as the City—acting through its elected officials and

agents—sees fit to keep them closed. However, when and if the parks are reopened as public parks each must be available for the benefit of all the public regardless of race or color upon a nondiscriminatory basis.

A formal judgment and formal writ of injunction will issue in accordance with the foregoing.

Done, this the 9th day of September, 1959.

JUDGMENT

Upon consideration of the findings of fact and conclusions of law as set forth in the memorandum opinion of this Court entered and filed in this cause on this date and in accordance with what this Court set out in said memorandum opinion, it is:

ORDERED, ADJUDGED and DECREED that Ordinance 21-57 of the City of Montgomery, Code of the City of Montgomery, Alabama, and each paragraph thereof, is unconstitutional and void in that said ordinance deprives plaintiffs, and other Negro citizens similarly situated, the equal protection of the laws and due process of law as secured by the Fourteenth Amendment to the Constitution of the United States.

It is further ORDERED, ADJUDGED and DECREED that the policy, custom, and usage of the defendants in denying to plaintiffs, and the other Negro citizens similarly situated, the use of any public parks owned and operated by the City of Montgomery, Alabama, this denial being solely upon account of color or race, is unconstitutional and void in that such custom, policy, practice and usage deprive plaintiffs, and other Negro citizens similarly situated, the equal protection of the laws and due process of law as secured by the Fourteenth Amendment to the Constitution of the United States.

It is further ORDERED, ADJUDGED and DECREED that the defendants, their successors in office, assigns, agents, servants, employees, and persons acting on their behalf, be and they are hereby permanently enjoined and restrained from enforcing the aforesaid ordinance, or any other ordinance or statute, or any custom, practice, policy or usage which may require plaintiffs, or any other Negroes similarly situated, to submit to enforced segregation solely because of race or color in their use of any public parks owned and operated by the City of Montgomery, Alabama.

Costs are taxed against defendants.

Done, this the 9th day of September, 1959.

3. The only testimony defendants offer with respect to the possibility of the parks being reopened on an unconstitutional basis is that they have "no present intention to reopen any of the parks during the present term of the incumbent Commissioners." The term of the "incumbent Commissioners" expires on October 5, 1959. One of the new Commissioners, the only incumbent being returned to office, was present during the taking of the testimony in this cause and at the counsel table. In response to an inquiry from the Court, after the close of the testimony by both sides and an expressed desire on the part of the Court for some testimony concerning the future intentions of the City of Montgomery in this respect, the Court was informed by this City Commissioner that that bridge would have to be crossed when they got to it.

GOVERNMENTAL FACILITIES Playgrounds—Michigan

Doris Dormire LA FOND, Phillip James Dormire, Sr., and Phyllis M. Dormire Carless v. CITY OF DETROIT, and Carl L. Reigh, Administrator of the Estate of Emma Katherine Sagendorph.

Circuit Court for the County of Ingham, Michigan, In Chancery, March 27, 1958, Docket No. 36114; Supreme Court of Michigan, October 12, 1959, 98 N.W.2d 530.

SUMMARY: Heirs of a deceased woman requested a Michigan circuit court to construe as void the clause in her will providing that "the balance of my estate . . . is to be given to the city of Detroit . . . for a playfield for white children, and known as the 'Sagendorph Field.'" The city of Detroit and the administrator of the estate were made defendants. Subsequently, the Detroit common council voted to accept the bequest if the court would authorize it to operate the playground without racial discrimination. The court held the clause to be void and against public policy, because to effectuate it the city would have to violate state laws and the Fourteenth Amendment to the United States Constitution by expending public funds to maintain and to police the playfield to prevent non-white children from using it. It was also held that to allow the city to use the proceeds to establish a playground for all races would be contrary to positive, definite "words of command" used in deceased's will. And the doctrine of *cy pres* was held not to apply, it being impossible to carry out the bequest's object. The bequest was, therefore, directed to be paid to the legal heirs. On appeal the Michigan Supreme Court, by an equally divided court, affirmed. Four justices agreed with the trial court that the words "for white children" are words of command and that the *cy pres* doctrine could not be invoked to validate the bequest. They found nothing to disclose a more general purpose than that specified and ruled that the *cy pres* doctrine can only be used to aid the court in carrying out the true intention of the donor, not to eliminate unambiguous words in the donor's will. Four other justices argued that the judgment should have been reversed, construing the bequest as charitable, made with the primary motive of benefitting their home city through a memorial to herself and her husband, rather than as an expression of prejudice against Negroes. Invoking a statute designed to save charitable bequests from invalidation because of uncertainty of the object, these justices preferred to employ the *cy pres* doctrine to apply the bequest to a non-exclusive playground rather than to defeat its charitable ends entirely and have the res distributed to heirs to whom it was "patent" that the testatrix did not intend to leave the money. Finally, these latter justices called attention to the lack of a provision in the will for gift over in event of failure of the condition, and emphasized a general judicial disfavor of forfeiture because of restrictive conditions attached to grants or conveyances.

COASH, Circuit Judge.

OPINION OF THE CIRCUIT COURT

The plaintiffs herein are residents of the State of Michigan, and are three of the heirs at law of Emma Katherine Sagendorph, deceased. The City of Detroit is a municipal corporation and named as the residuary legatee in the Last Will and Testament of Emma Katherine Sagendorph, deceased, and Carl L. Reigh, a resident of Ingham County, is the administrator with Will annexed, of the estate of Emma Katherine Sagendorph, deceased. The said Emma Katherine Sagendorph died on the 19th day of December,

1953, and was a resident of Ingham County at the time of her death. The said Carl L. Reigh was appointed administrator of her estate on July 22, 1954, the executor named in her Will having died.

By the terms of the Will of said Emma Katherine Sagendorph, deceased, after certain bequests were made, the residue of her estate was to be distributed as follows:

"The balance of my estate after deducting the above bequests is to be given to the City of Detroit, Wayne County, Michigan, for a playfield for white children and to be known as the Sagendorph Field."

Further on in her Will she stated as follows: "I have drawn this Will according to Arthur's express wishes, or as nearly as possible, and trust it will be carried out to the letter."

The Arthur referred to in the above quote was apparently the deceased husband of the testatrix. It is the contention of the heirs of said Emma Katherine Sagendorph, deceased, that the provision in her Will to provide a "playfield for white children" is void and against public policy and incapable of being carried out, and of no effect. On the other hand, it is the claim of the City of Detroit that the provision is not void and that the City of Detroit is entitled to the residue of her estate.

[Relief Requested]

The plaintiffs herein have filed their bill of complaint asking this Court to construe the residuary clause thereof and declare the same to be void, and asking this Court to direct that distribution of the residue of her estate shall be made to her heirs at law, and that the administrator, Carl L. Reigh, be enjoined from distributing or assigning the residue of her estate to the City of Detroit.

Some time after this cause was started the prosecuting attorney of the County of Wayne, Michigan, petitioned this Court to intervene as a party defendant, it being his claim that the Circuit Court for the County of Wayne was the proper Court having jurisdiction in the above cause. This petition was denied by this Court after which the City of Detroit filed petition in the Supreme Court of Michigan seeking Writs of Prohibition and Mandamus to this Court, which petition was denied by that Court upon return made, and this Court retained jurisdiction.

Other motions were made by the defendants herein, all of which were denied. Extensive briefs were then filed by the respective parties going to the merits of said cause.

[Provisions Declared Void]

This Court has reviewed briefs filed by the respective parties herein, as well as the extensive law pertaining to the subject matter of this cause, and is of the opinion that the heirs at law are entitled to the residue of the said estate because the provisions of the Will of the said Emma Katherine Sagendorph, deceased, in es-

tablishing a playfield for white children is void and contrary to public policy. To carry out such a bequest would necessitate violations of laws of this state and be contrary to the Constitution of the United States, and especially the 14th Amendment.

If the residue of this estate were to be given to the City of Detroit it would be necessary for the City of Detroit to spend public funds to police and maintain any playfield which might be established in order to prevent children of any race except the white race from using said playfield. This cannot be done.

The City of Detroit in attempting to accept this bequest adopted a resolution by their common council in which they stated that they would not carry out the bequest, and establish a playfield for white children, but would establish a playground for all races. In the Will of the deceased she requested that the terms of her Will be "carried out to the letter." The resolution of the council of the City of Detroit expressly states that her wishes would not be carried out, but that they would accept the money and then do exactly contrary to the wishes of the deceased.

The Supreme Court of the United States has in recent decisions, declared that any laws, actions, wills, and regulations which call for segregation of races are contrary to public policy and void. To carry out the provisions of the Will of the deceased would provide for the segregation of races and would, therefore, be void.

[Applicability of Statute]

Act 280 P.A. of 1915, § 26.1191 M.S.A. provides in part:

"that no gift, grant, bequest or devise * * * to religious, educational, charitable or benevolent uses * * * which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust * * *

The bequest of the deceased is not indefinite nor uncertain, but is a very positive order. She states in her last Will that she wanted a playfield established for white children. Nothing could be more positive or definite than her statement, but to carry out this bequest would be contrary to the laws of the State of Michigan, and the United States of America. The deceased had a right to make out her last Will and Tes-

tament, and had a right to rely that the provisions of her Will would be carried out to the letter, but she could not ask that the provisions of her Will be carried out, or that the money of her bequest to establish a playfield for white children be put into effect only if the laws of this State and the United States Constitution were violated.

The words "a playfield for white children" were "words of command", and would not allow the City of Detroit to accept this bequest and then do exactly opposite from that commanded by the deceased.

It is the claim of the defendants that the doctrine of "cy pres" would apply in this case and would validate the bequest of the deceased. This Court cannot find where this doctrine applies because such doctrine does not apply where it is impossible to carry out the object of the bequest. In this cause as hereinbefore stated, in order to carry out the bequest of the deceased it would be necessary to violate the laws of this state and of this country.

Therefore, this Court finds that the provisions in the Will of the deceased giving the residue of her estate to the City of Detroit for a playfield for white children is void as against public policy and incapable of being carried out. The residue of said estate shall be payable to the legal heirs of said deceased.

A decree may enter pursuant to this opinion.

DECREE

This cause having been brought on to be heard upon the Bill of Complaint filed herein, proofs having been taken in open court upon trial of said cause, on reading the Bill of Complaint and hearing the proofs, taken as aforesaid, and the court having considered the briefs of the parties filed herein, upon filing an opinion on the 27th day of March, 1958, from which it appears that the relief sought by the plaintiffs herein should be granted,

ON MOTION of Roland F. Rhead, one of the attorneys for the said plaintiffs,

IT IS ORDERED, ADJUDGED AND DECREED, that the residuary clause of the Last Will and Testament of Emma Katherine Sagen-dorph is void as against public policy and incapable of being carried out, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the distribution of the

residue of the estate of Emma Katherine Sagen-dorph, deceased, which estate is pending before the probate court for the County of Ingham, after the payment of specific bequests, taxes and costs of administration, shall be made payable to the legal heirs of said deceased, and

The defendant, Carl L. Reigh, is hereby permanently enjoined forever from assigning, distributing, or otherwise in any way transferring the residue of the estate of Emma Katherine Sagen-dorph, deceased, to the City of Detroit, a municipal corporation.

OPINION OF SUPREME COURT

KELLY, J.

Plaintiffs, as heirs of Emma Katherine Sagen-dorph, deceased (hereinafter referred to as deceased), on October 28, 1954, filed their bill of complaint requesting the circuit court of Ingham county to construe as void the residuary clause in deceased's will, which provided:

"The balance of my estate after deducting the above bequests is to be given to the city of Detroit, Wayne county, Michigan for a playfield for white children, and known as the 'Sagen-dorph Field'."

Defendant city of Detroit filed its answer (November 15, 1954) claiming plaintiffs should be denied relief because "the bequest made under said residuary clause was for an educational purpose and valid by reason of the provisions of Act 280, Public Acts 1915, of the State of Michigan, as amended, being Sections 26.1191 to 26.1193, inc., M.S.A., and by reason of the provisions of Act 373, Public Acts 1925, of the State of Michigan, being Sections 26.1201, 26.1202, M.S.A., and by reason of Act 380, Public Acts 1913, of the State of Michigan, being Section 5.3421 M.S.A., and by reason of the doctrine of cy pres in force in the State of Michigan, and for the further reason that the words in said residuary clause, to-wit, 'for white children' are merely precatory."

February 17, 1955, defendant city filed its motion to dismiss plaintiffs' bill of complaint "because the (Wayne county) prosecuting attorney has not been made a party defendant" and "because the court of chancery for the county of Wayne is the proper court having jurisdiction to construe the residuary clause in said will."

[Detroit Common Council's Action]

On July 14, 1955, Detroit's corporation counsel's memorandum to the common council and the resolution of the Detroit common council were filed. The corporation counsel's memo to the common council alleged: 1) That deceased left an estate of \$32,830.11 and after payment of bequests in the will, plus claims and administration costs, there would be about \$25,000 for the residuary legatee, the city of Detroit; 2) That "because of the onerous conditions imposed by the said testatrix in the residuary clause of her will, as aforesaid, it is legally necessary for your honorable body to determine by resolution, before the final hearing of said cause, whether the city accepts or rejects the aforesaid bequest."

The Detroit common council's resolution, unanimously adopted, stated:

"Resolved, That the city of Detroit, a municipal corporation, accept and it does hereby accept the bequest of Emma Katherine Sagendorph, Deceased, as stated in the residuary clause of her will, heretofore admitted to probate in the Ingham county probate court, provided the court will construe the said residuary clause as giving the city of Detroit the right to make the playfield available to all children, without regard to race, color or creed, and Be It Further

"Resolved, That after payment of said bequest to the city, the Parks and Recreation Commission be, and it is hereby authorized to provide a playfield for children in the city of Detroit, in accordance with the court's construction of said residuary clause, and to name such field 'Sagendorph Field.'"

November 23, 1956, the prosecuting attorney for the county of Wayne filed his petition for leave to intervene as party defendant, alleging that deceased's will (dated September 15, 1948) was executed while she was a resident of the city of Detroit and that PA 1915, No 280 (CL 1948, § 554.351 *et seq.* [Stat Ann 1953 Rev. § 26.1191 *et seq.*]) and "all of the facts which can be reviewed at this time, indicate that it was the intention of the testatrix that jurisdiction be in the circuit court for the county of Wayne and accordingly, that your petitioner as prosecuting attorney in and for said county, should represent the beneficiaries of this trust."

[Circuit Court's Opinion Quoted]

The prosecuting attorney's petition was denied. The city of Detroit then petitioned this Court for a writ of prohibition and mandamus, which we denied, and the Ingham county circuit court retained jurisdiction. On March 27, 1958, it filed its opinion. The following are excerpts therefrom:

"The city of Detroit in attempting to accept this bequest adopted a resolution by their common council in which they stated that they would not carry out the bequest, and establish a playfield for white children, but would establish a playground for all races. In the will of the deceased she requested that the terms of her will be 'carried out to the letter'. The resolution of the council of the city of Detroit expressly states that her wishes would not be carried out, but that they would accept the money and then do exactly contrary to the wishes of the deceased. * * *

"The bequest of the deceased is not indefinite nor uncertain, but is a very positive order. She states in her last will that she wanted a playfield established for white children. Nothing could be more positive or definite than her statement, but to carry out this bequest would be contrary to the laws of the State of Michigan, and the United States of America. * * *

"The words 'a playfield for white children' were 'words of command', and would not allow the city of Detroit to accept this bequest and then do exactly opposite from that commanded by the deceased.

"It is the claim of the defendants that the doctrine of 'cy pres' would apply in this case and would validate the bequest of the deceased. This court cannot find where this doctrine applies because such doctrine does not apply where it is impossible to carry out the object of the bequest. In this cause as hereinbefore stated, in order to carry out the bequest of the deceased it would be necessary to violate the laws of this state and of this country."

[Questions Submitted]

Appellant submits three questions. The first challenges the court's jurisdiction; the second question deals with the court's refusal to recognize the prosecuting attorney of Wayne county

as "a necessary party at the trial"; and because the third question is the major one and most important, it shall be considered first in this opinion. It reads as follows:

"Did racial restriction—white—in residuary trust bequest to appellant city of Detroit in the will of Emma Katherine Sagendorph, deceased, limiting availability of playfield to white children, render entire bequest void as against public policy, or was the racial restriction therein void and the bequest otherwise legal thus making playfield available to all the children?"

We are considering a gift of the bulk of deceased's estate to the city, and deceased's express wish must be respected and carried out irrespective of this Court's desire to aid and encourage the creation of city playgrounds for children of all races and color. The words in the will commanding that the will "be carried out to the letter" cannot be forgotten or disregarded. Deceased expressed in unambiguous language that she was making a bequest for the establishment of "a playfield for white children."

The city of Detroit by its corporation counsel's memorandum to the common council (prior to the adoption of the council's resolution) disclosed it did not consider the words "a playfield for white children" as unimportant and incidental, but characterized these words as creating "onerous conditions imposed by the said testatrix."

I disagree that by providing for a playground for white children the aged testatrix, who desired to create a memorial for her deceased husband, expressed "hatred for children of all races except white" or that her "intentions were more of a striking back at the Negro population than as a charitable effort." There is nothing in the will nor in the record that sustains a conclusion that she made the bequest because she wanted to make certain her legal heirs would not share in her estate.

[*Cy Pres Doctrine*]

Justice Edwards, endeavoring to apply the *cy pres* doctrine, quotes the American Law Institute's Restatement of Trusts to the effect that, where the gift or bequest is impractical to carry out, or illegal, and where it is manifest there was "a more general intention to devote the property to charitable purposes," "the doctrine

of *cy pres* is applicable unless" there is "manifested an intention that the property should be applied solely to the purpose." There is nothing in the will nor in the record disclosing a more general purpose than the specified purpose—a playfield for white children—and there is nothing in the will or record which in the slightest way indicates deceased desired the money to be applied to any other purpose than "a playfield for white children."

[*Doctrine's Purpose*]

The *cy pres* doctrine is used to aid the court in carrying out the true intention of the donor and cannot be used for the purpose of eliminating the unambiguous words found in deceased's will.

The general rule governing the *cy pres* doctrine is clearly set forth in 74 ALR 671, as follows:

"It not infrequently occurs that the method of executing a charitable trust defined by the terms of the instrument creating it is impracticable or illegal. In those jurisdictions wherein the *cy pres* doctrine is recognized, it is quite generally held in such circumstances that, if the instrument indicates a general intention or dominant purpose on the part of the donor that the property is to be devoted to charitable purposes regardless of the peculiar method of execution, the *cy pres* doctrine will be applied. Numerous authorities support this rule and its converse,—that where the charitable purpose is limited to a particular object or to a particular institution, and no general charitable intent is manifest from the instrument, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, the doctrine of *cy pres* does not apply, and in the absence of any limitation over, or other provision, the legacy lapses."

Appellant calls attention to PA 1915, No 280, § 1 (CL 1948, § 554.351 [Stat Ann 1953 Rev. § 26.1191]), which provides:

"No gift, grant, bequest or devise . . . to religious, educational, charitable or benevolent uses . . . which shall in other respects be valid under the laws of this state, shall be invalid by reason of the in-

definiteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities."

This statute does not apply because we do not have an "indefiniteness or uncertainty of the object of such trust" or a bequest contrary to "any statute or rule against perpetuities."

We agree with the trial court "for white children" are words of command and the cy pres doctrine cannot be invoked to validate the residuary bequest.

The will does not indicate a general intention to provide for a general charitable purpose rather than for a particular designated object. The cy pres doctrine is used to aid the court in carrying out the true intention of the donor and cannot be used for the purpose of eliminating the unambiguous words found in deceased's will. See 74 ALR 671, 678.

Subsequent to drawing the will in Detroit, deceased became a resident of Webberville, Ingham county, where she resided at the time of her death, and her will was admitted to probate in Ingham county.

We do not agree with appellant's contention that the circuit court of Ingham county lacked jurisdiction, or that error was committed in refusing to allow the prosecuting attorney of Wayne county to be made a party defendant.

Affirmed. No costs, a public question being involved.

. . .

DETHMARS, CARR, and KAVANAGH, JJ.
concur.

SECOND SUPREME COURT OPINION

EDWARDS, J.

The basic question in this case is whether an old lady, in setting up a memorial trust in honor of her deceased husband, had as her basic intent a charitable purpose toward the children of the city of Detroit, or an expression of hatred for children of all races except white.

The words she used were:

"The balance of my estate after deducting the above bequests is to be given to the city of Detroit, Wayne county, Michigan for a playfield for white children, and known as the 'Sagendorph Field.'"

All parties to this litigation concur that the 14th Amendment to the Constitution of the United States forbids the city of Detroit from maintaining an exclusively white playground if, indeed, the term "exclusive" be deemed a part of Mrs. Sagendorph's intention.

The alternatives before this Court are 1) to give such legal effect to Mrs. Sagendorph's bequest as may be consistent with the Constitution of the United States in the providing of a playground for white and all other children of the city of Detroit; or 2) to defeat the charitable trust in its entirety and have the trust res distributed to heirs to whom it is patent Mrs. Sagendorph did not intend to leave this money.

[Cy Pres Doctrine]

Charitable bequests have been a source of difficulty and concern for all of the past history of the courts. And under a doctrine broadly, and perhaps loosely, called the cy pres doctrine,¹ the courts have come to a general rule requiring liberal construction of charitable trusts to preserve as nearly as may be the charitable purposes of the donor in the event of some ambiguity, or some impossible or illegal condition. In re Estate of Lundquist, 193 Minn 474 (259 NW 9); Bruce v. Maxwell, 311 Ill. 479 (143 N.E. 82); Jackson v. Phillips, 14 Allen (Mass) 539.

Michigan has long recognized that a memorial bequest to a municipality for playground purposes is a charitable bequest. Greenman v. Phillips, 241 Mich. 464. Michigan has also recognized the cy pres doctrine in case law. Gifford v. First National Bank of Menominee, 285 Mich 58; In re Hannan's Estate, 227 Mich 569.

The essence of the cy pres doctrine has been recognized by legislative enactment:

1. At common law in England, the Crown exercised its prerogative power to apply funds given for a charitable, but illegal, purpose to some valid charitable purpose without regard for the settlor's intention. Property otherwise given for a particular charitable purpose which became incapable of fulfillment was directed by the chancellor under the doctrine of cy pres to another charitable purpose which fell within the general charitable intention of the settlor.

The prerogative power, of course, does not exist in this country. The cy pres doctrine applied in the United States is a rule of judicial construction designed to approximate as closely as possible the desires of the settlor. Jackson v. Phillips (1867), 14 Allen (Mass) 539, pp 578-581; Restatement, Trusts 2d § 399h, p. 301; 10 Am Jur, Charities, § 123, p. 676. (Footnote renumbered)

"No gift, grant, bequest or devise, whether in trust or otherwise to religious, educational, charitable or benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, or anything therein contained which shall in other respects be valid under the laws of this State, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities." CL 1948, § 554.351 (Stat Ann 1953 Rev § 26.1191).

"The court of chancery for the proper county shall have jurisdiction and control over the gifts, grants, bequests and devises in all cases provided for by section 1 of this act. Every such trust shall be liberally construed by such court so that the intentions of the creator thereof shall be carried out whenever possible." CL 1948, § 554.352 (Stat Ann 1953 Rev § 26.1192). (Emphasis supplied.)

In addition, the legislature has provided authority to cities to receive such bequests. CL 1948, § 123.871 (Stat Ann 1958 Rev § 5.3421).

We believe the italicized statutory language was designed to preserve charitable bequests from invalidity in just such a situation of uncertainty pertaining to object or beneficiaries as is here presented. *In re Jones' Estate*, 334 Mich 392.

[Restatement of Trusts Formulation]

The American Law Institute's Restatement of Trusts provides the following general rule as to the cy pres doctrine:

"If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor." Restatement, Trusts 2d § 399, p. 297.

Specifically as to an illegal condition, the Restatement continues:

"A disposition for charitable purposes may fail, in whole or in part, either at the outset or subsequently, because the purposes or some of them are or become illegal. In such a case the doctrine of cy pres is applicable unless the settlor manifested an intention that the property should be applied solely to the purpose which is or has become illegal." Restatement, Trusts 2d § 399n, p. 305.

As to testatrix' intentions, appellees' brief has stated their position vividly: "Emma Katherine Sagendorph's intentions were more of a striking back at the Negro population than as a charitable effort." We entertain no doubt that testatrix' language implies some prejudice. And we note also that she desired the entire will "carried out to the letter."

But we do not find in this will any provision for gift over in the event of failure of the condition referred to. And forfeiture because of restrictive conditions attached to grants or conveyances of land is not generally favored. *Conrad v. Long*, 33 Mich 78; *Adams v. First Baptist Church of St. Charles*, 148 Mich 140.

See, also, CL 1948, § 554.46 (Stat Ann 1957 Rev § 26.46).

[Testatrix' Intention]

Nor do we find any impelling reason to construe the words of the testatrix so as to hold that her sole purpose was one of exclusion. This will on its face bestows the bulk of an old lady's estate upon the city where she and her husband spent their lives. It provides for an obvious charitable purpose—a playground. It provides for the playground to carry the family name.

It would take clearer and more dramatic language than we find in this will for us to hold that testatrix' real intention was one of revenge rather than one of charity. Even if the word "white" contained in her bequest be thought of as a word of exclusion (and the testatrix did not so require), we believe the basic purpose of the bequest is patently that of a memorial to her husband and herself to perpetuate their memory in a playground for children in the city of Detroit.

The trustee, city of Detroit, has by resolution

effectively provided for the carrying out of the purpose of the bequest, excluding, of course, any condition which would violate the United States Constitution. This fulfills her intention as nearly as may be.

[Girard Case]

We note that appellees cite the Girard College cases to us (Girard Will Case, 386 Pa 548; Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 US 230; Girard College Trusteeship, 391 Pa 434, cert den 357

US 570.² For our present facts, the most significant thing about these cases is that no court held the bequest to the college invalid.

As to the other questions presented, we concur with Mr. Justice Kelly's opinion.

Reversed for the entrance of a decree giving effect to the bequest in accordance with this opinion. Costs to appellant.

SMITH, BLACK and VOELKER, JJ., concur.

2. For a discussion of the impact of these cases on charitable trusts generally, see 68 Yale LJ 979, Clark's Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard. (Footnote renumbered).

GOVERNMENTAL FACILITIES

Swimming Pools—North Carolina

Deloris TONKINS et al. v. CITY OF GREENSBORO, North Carolina, and James R. Townsend, City Manager, Greensboro Pool Corporation, a North Carolina business corporation, and its three officers: Dr. R. M. Taliaferro, President, Carroll O. Weaver, Secretary and Treasurer, and H. L. Coble, Vice-President.

United States District Court, Middle District, North Carolina, Greensboro Division, August 13, 1959, 175 F.Supp. 476.

SUMMARY: The city of Greensboro, North Carolina, and its manager were sued in federal district court by Negro citizens, who asked declaratory and injunctive relief against defendants' refusal on racial grounds to allow their use of a municipal swimming pool and against the sale of the pool to avoid municipal operation, in denial of their constitutional rights. Although concluding that plaintiffs were not entitled to such relief since the city has no duty to own or operate recreational facilities and since a bona fide public sale would not constitute racial discrimination by the city, the court deferred entry of a decree dismissing the action until thirty days after the sale to give plaintiffs an opportunity to show that the sale was not bona fide or that there was collusion between the city and the successful bidder concerning the future operation of the pool. 162 F.Supp. 549, 3 Race Rel. L. Rep. 704 (1958). After sale to a corporation, plaintiffs filed a supplemental complaint, making the corporation and three of its officers additional defendants, alleging that the corporation was not a bona fide purchaser, and praying that defendants be enjoined from refusing to permit plaintiffs and their class from using the pool on the same terms as white citizens. The court dismissed the complaint, finding from defendants' uncontradicted testimony that the sale was advertised and conducted according to statutory and city charter provisions; that all persons had equal opportunity to bid; that no city officer attempted to obtain from the pool corporation any commitment that anyone would be excluded from the pool for racial reasons; that the city and its officers had not attempted to influence the operation of the pool subsequently; and that the property value is assessed at the customary rate for the city and county, and the corporation has never attempted to secure any kind of concession or exemption from the city. It was held, on the other hand, that the fact that the corporation president happened to be a city official and had originally insisted upon continued city segregated op-

eration of the pool did not indicate a secret agreement concerning its future operation; that the facts that the corporation was given a five-year period in which to pay the purchase price and that an assistant city attorney was named trustee in a deed of trust securing the purchase price balance were not sufficient to show that the sale was not bona fide; that the inclusion of an acceleration clause in the deed of trust which might be used by the city to exact a commitment that the pool be operated on a segregated basis in exchange for an extension of time for payment, was not a sufficient threat to impeach the sale; and that the failure of the city to change the zoning ordinance which allowed the pool to be operated only on a non-profit basis, thus eliminating many potential bidders, did not permit an inference adverse to defendants. The court also rejected plaintiffs' contention that the sale could not be bona fide since the corporation had announced publicly prior to the sale that it would operate the pool exclusively for white citizens, there being no legal basis for the theory that a city may sell a recreational facility only on condition that the purchaser will operate it on an integrated basis.

STANLEY, District Judge.

In the original complaint the plaintiffs sought to enjoin the City of Greensboro and its City Manager, James R. Townsend, from refusing to permit plaintiffs, Negro citizens of the City of Greensboro, to use the Lindley Park Swimming Pool, a municipally owned recreational facility, and to enjoin said defendants from selling the pool for the sole purpose of denying the plaintiffs their constitutional rights.

In an opinion filed on May 23, 1958, this court concluded that the plaintiffs were not entitled to the relief sought, but deferred the entry of a decree dismissing the action for a period of 30 days after the sale of the swimming pool had been confirmed by the City of Greensboro, to give the plaintiffs an opportunity to show that the sale was not bona fide in the sense that there was collusion between the City of Greensboro and the successful bidder regarding the future operation or use of the pool. *Tonkins v. City of Greensboro*, D.C.M.D.N.C.1958, 162 F.Supp. 549.

[Pool Sold]

Following the facts and events recited in the opinion referred to above, the Lindley Park Swimming Pool was sold at public sale on June 3, 1958, when the Greensboro Pool Corporation became the last and highest bidder for the sum of \$85,000.

The City Council of the City of Greensboro met on June 5, 1958, and adopted the following resolution:

"Resolution Accepting Bid Of Greensboro Pool Corporation For The Lindley Park Swimming Pool

"Whereas, at the public sale held on 3 June 1958, Greensboro Pool Corporation placed the high bid on the Lindley Park Swimming pool in the amount of \$85,000, which bid, in the opinion of the City Council, should be accepted;

"Now, Therefore, Be It Resolved By The City Council Of The City Of Greensboro:

"That the bid of Greensboro Pool Corporation in the amount of \$85,000 for the Lindley Park swimming pool is hereby accepted, and the sale of the pool in accordance with the bid is hereby authorized, and the Mayor and City Clerk are hereby authorized to execute and deliver a conveyance of the property."

After having been given an extension of time to file written motion for leave to show that the sale was not bona fide in the sense that there was collusion between the defendants and the successful bidder regarding the future use or operation of the pool, the plaintiffs, on August 12, 1958, filed a motion for leave to file supplemental complaint making the Greensboro Pool Corporation and its three principal officers additional defendants. This motion was granted by order entered on September 5, 1958. Thereafter, copies of the supplemental complaint were served upon all the defendants. The defendants filed answers denying the material allegations in the supplemental complaint.

[Supplemental Complaint]

The supplemental complaint alleges a number of reasons why the Greensboro Pool Corporation is not a bona fide purchaser of the Lindley Park Swimming Pool, and prays that all the defendants be enjoined from refusing to permit the

plaintiffs and members of their class to use the Lindley Park Swimming Pool upon the same terms and conditions applicable to the white citizens of the city.

When evidence in regard to the allegations contained in the supplemental complaint was heard the parties were afforded an opportunity to file proposed findings of fact and conclusions of law and briefs in support of their respective positions.

After carefully considering all the evidence, together with the briefs and requests for findings of fact and conclusions of law submitted by the parties, it is concluded that the plaintiffs have wholly failed to sustain the allegations in their supplemental complaint.

It conclusively appears that the sale was duly and regularly advertised and conducted in accordance with the provisions of the General Statutes of North Carolina and the Charter of the City of Greensboro relating to the sale of municipally owned property, and that the procedures followed in advertising and selling the property, including the terms extended for the payment of the purchase price, were identical with that which has been regularly followed by the City of Greensboro over a period of many years in connection with the sale of city-owned real estate having an appraised value in excess of \$15,000; that all persons, regardless of race, were afforded an equal opportunity to bid at the sale, and that none of the defendants, or anyone acting on their behalf, did anything to discourage or prevent others from bidding against the Greensboro Pool Corporation at the sale; that no officer or employee of the City of Greensboro obtained or attempted to obtain from the Greensboro Pool Corporation, or anyone acting on its behalf, any agreement, commitment or assurance that anyone would be excluded from the Lindley Park Swimming Pool by reason of race or color; that neither the City of Greensboro, nor any of its officers or employees, have influenced or attempted to influence the formulation of plans and policies for the operation of the swimming pool by the Greensboro Pool Corporation; that neither the Greensboro Pool Corporation, nor any of its officers, directors or employees, nor anyone else acting on its behalf, took any part in formulating the terms and conditions upon which the Lindley Park Swimming Pool was offered for sale by the City of Greensboro; that the City of Greensboro did not reserve or attempt to reserve any super-

vision or control over the operation of the Lindley Park Swimming Pool by the Greensboro Pool Corporation, other than by the application of uniform municipal zoning and other laws and ordinances; that the pool is located in a residential area, and the land upon which it is located has long been subject to a zoning ordinance restricting the operation of any business to a non-profit or non-commercial basis, and the City of Greensboro refused to re-zone the property prior to the time the pool was offered for sale; that the pool property is listed for municipal and county ad valorem tax purposes for \$59,500, which is 70% of the sale price of \$85,000, and is the customary method of evaluating real property for ad valorem tax purposes; and that the Greensboro Pool Corporation has never claimed or attempted to secure any concession or exemption of any kind from the City of Greensboro or any other governmental authority with respect to any municipal or governmental function or service, including water rates, ad valorem taxes, franchise taxes, income taxes, or any other applicable tax of any kind.

[Plaintiffs' Contentions]

The facts recited above are based upon the uncontradicted testimony of responsible officers and officials of the City of Greensboro and the Greensboro Pool Corporation. The plaintiffs contend, however, that the testimony of these officers and officials should not be accepted in arriving at the true relationship between the parties, for the reason that the record discloses a series of events, none of which are of great significance standing alone, but all of which, when considered together, point to a wholly different conclusion. For example, the plaintiffs point to the fact that Dr. Taliaferro, the President of the Greensboro Pool Corporation, is also a member of the Parks and Recreational Commission of the City of Greensboro, and originally insisted that the city continue to operate the pool on a segregated basis; that the Mayor, City Manager and members of the City Council of the City of Greensboro knew that the officers of the Greensboro Pool Corporation had publicly stated that the pool, if acquired, would continue to be operated for the sole use of the white citizens of the City of Greensboro; that the first bid of \$75,000 was rejected in order to give the Greensboro Pool Corporation time to raise additional funds; that the city refused to change a zoning

ordinance which required the pool to be operated on a non-profit basis, thereby eliminating many potential bidders; that the city extended liberal terms for the payment of the purchase price of the pool to the Greensboro Pool Corporation so as to make the purchase easier; and that the city has retained control over the future operations and use of the pool by the Greensboro Pool Corporation by naming one of its attorneys the trustee in a deed of trust securing the unpaid balance of the purchase price. While these contentions of the plaintiffs have support so far as they relate to facts appearing in the record, the conclusions the plaintiffs attempt to draw from these facts are wholly without merit. The fact that Dr. Taliaferro, one of the organizers of the Greensboro Pool Corporation, happened to also be a member of a city commission which supervises public recreational facilities, certainly does not indicate, in the face of overwhelming testimony to the contrary by responsible citizens, that there was some secret and undisclosed agreement between the city and the Greensboro Pool Corporation concerning the future use and operation of the pool. Certainly no inference adverse to the defendants can be drawn from the fact that the city refused to amend a zoning ordinance so as to permit a commercial operation to be carried on in a residential district. Neither does it behoove the plaintiffs to urge the court to disregard the evidence and hold that the sale was not bona fide by reason of the fact that the Greensboro Pool Corporation was permitted to pay the purchase price over a period of five years, and the fact that an assistant city attorney was named trustee in a deed of trust securing the balance of the purchase price, in light of the stipulations that this was the normal procedure that had been followed in the sale of municipally owned property over a period of many years. Perhaps some point could have been made if the city had adopted a procedure different from that customarily followed. The function of a trustee in a deed of trust is to foreclose and sell the property when there has been a default, and when requested to do so by the holder of the note. The plaintiffs theorize that where the city retains the option to declare the entire debt due upon the failure to pay any annual installment within the time prescribed, and one of its attorneys is the trustee in the deed of trust, this gives the city the power to control the manner in which the pool will be operated. This theory presupposes that the owner of the

pool will default in its obligation and be compelled to request an extension of time for the payment of the annual installments called for in the deed of trust, and that the city, the owner of the note, will grant the extension only if the owner of the pool agrees that the city may have the right to formulate all policies concerning the use and operation of the facility, and that the city will then impose the obligation that the facility be operated on a discriminatory basis. There is absolutely nothing in the record upon which to base such conclusions. Courts are not permitted to decide legal issues on the basis of unsupported theories. There is no credible evidence in the record to support the contention that the Greensboro Pool Corporation will either default in its payment, be granted an extension of time to pay the annual installments, or that the city would repurchase the property at any foreclosure sale. It will be time enough for the plaintiffs to complain in the event the property is again acquired by the City of Greensboro and it attempts to operate the pool on a discriminatory basis.

[Novel Theory Rejected]

The plaintiffs make the additional contention that the sale could not be bona fide since the Greensboro Pool Corporation publicly announced before the sale that if it acquired title to the pool same would be operated for the exclusive use of the white citizens of Greensboro. This contention is based on the novel legal theory that municipalities may only sell recreational facilities upon the condition that the purchaser will operate the facility on an integrated basis. No authority is cited in support of this contention.

Since it has previously been held that the City of Greensboro had a legal right to close and sell its swimming pool facilities at bona fide sales, this opinion is limited to a determination of whether or not the completed sale of the Lindley Park Swimming Pool was bona fide in the sense that the city divested itself of all control over the future use and operation of the pool.

It is concluded that the plaintiffs have failed to sustain the burden of showing that the sale was not bona fide, or that the City of Greensboro has any agreement of any kind with the Greensboro Pool Corporation relating to the future ownership, use or operation of the pool. It necessarily follows that the complaints should

be dismissed and that the plaintiffs should pay the costs of this action.

This supplemental opinion, together with the original opinion above referred to, constitutes findings of fact and conclusions of law pursuant

to the provisions of Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A.

Counsel for the defendants will prepare and present to the court for signing a judgment in conformity with this opinion.

INDIANS

Jurisdiction—South Dakota

In the Matter of the Petition of Matthew High PINE and Paul Woman Dress for a Writ of Habeas Corpus.

Supreme Court of South Dakota, November 2, 1959, 99 N.W.2d 38.

SUMMARY: A South Dakota justice of the peace convicted a Sioux Indian of public intoxication committed "on a public highway" and imposed a jail sentence. In a habeas corpus proceeding, a circuit court held the justice of the peace to be without jurisdiction and discharged the Indian from the county Sheriff's custody because the offense was committed within the Pine Ridge Indian Reservation. The sheriff appealed, but the Supreme Court of South Dakota affirmed. Noting that the United States Supreme Court had held that a state has no jurisdiction over crimes committed by Indians on a reservation absent a congressional grant, the court rejected the sheriff's contention that such grant had been made: (1) by a 1953 federal statute giving consent to "any state" to amend its constitution or statutes to remove any impediment to the assumption of criminal jurisdiction over Indian country; and (2) by a 1951 state statute prospectively accepting this authority by providing that "in the absence of treaty or statute of the United States," the state would have criminal jurisdiction over "any person" committing an offense under state law on any Indian reservation or in Indian country. The court was of the opinion that the legislature could not have intended by the general terms of its 1951 Act to attempt to create a special jurisdiction over crimes by Indians within Indian country which was not even offered to it by Congress until 1953, while a 1957 statute providing for conditional acceptance would have been useless had the legislature thought the subject matter thereof had been unconditionally acquired in 1951.

INDIANS

Jurisdiction—Washington

STATE of Washington, Plaintiff and Relator v. Janice PAUL, Defendant. Superior Court for Snohomish County, Charles R. Denney, Judge, Respondent.

Supreme Court of Washington, March 26, 1959, 337 P.2d 33.

SUMMARY: An Indian woman residing on the Tulalip Indian reservation in Snohomish County, Washington, was charged by information with the crime of second degree assault upon an Indian on the reservation. The trial judge of the superior court for Snohomish County ordered the cause dismissed with prejudice for lack of jurisdiction. He ruled that a 1957 act

of the state legislature assuming criminal jurisdiction over Indians and Indian lands within the state (Congress already having consented to such assumption) was unconstitutional because the Washington constitution provides that Indian lands shall remain under the absolute jurisdiction of Congress, unless contrary arrangement be made with "the consent of the United States and the people of this state." The Supreme Court of Washington reversed the judgment, holding that the constitutional requirement of "consent of . . . the people of this state" was not intended to necessitate action by the people themselves in voting to amend the state constitution but was satisfied by action of the people's representatives through legislative enactment.

MUNICIPALITIES

Boundaries—Alabama

C. G. GOMILLION et al. v. Phil M. LIGHTFOOT, as Mayor of the City of Tuskegee, et al.

United States Court of Appeals, Fifth Circuit, September 15, 1959, 270 F.2d 594.

SUMMARY: Twelve Negroes brought a class action in federal district court against officials of Tuskegee and of Macon County, Alabama, challenging a 1957 legislative act [2 Race Rel. L. Rep. 856 (1957)] redrawing the city's boundary so as to remove therefrom all but four or five qualified Negro voters, but no qualified white voter. It was alleged that the statute's purpose and effect was to deny to plaintiffs the rights to vote in city elections and to participate otherwise in city affairs and to deprive them of police protection, street improvements, and other rights of municipal citizenship. Plaintiffs requested a declaration that the Act as applied to them violated the due process and equal protection clauses of the Fourteenth Amendment, and the Fifteenth Amendment, and prayed for injunctions against the enforcement of the Act as to them and their class. The court, however, sustained defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted and for lack of jurisdiction. 167 F.Supp. 405, 3 Race Rel. L. Rep. 1220 (M.D. Ala. 1958). On appeal, the Court of Appeals for the Fifth Circuit affirmed, one judge dissenting. Noting authority to the effect that "the power of increase and diminution of municipal territory is plenary, inherent and discretionary in the Legislature, and, when duly exercised, cannot be revised by the courts," the court stated that such power is not restricted even when the effect of its exercise is to remove involuntarily persons from corporate membership and to cause them to lose incidental benefits, privileges and immunities. Further, it was declared that in considering such statutes, courts are to refrain from inquiring into legislative motive and are not to be influenced by the opinions of legislators. The "universally recognized sovereign power" of a state legislature to enact a statute of this nature, reserved by the Tenth Amendment, is not to be restricted by prohibiting its exercise, the court added, although as an incidence Negroes are purposely excluded from a city and from participation in its affairs, for where racial or class discrimination does not appear on the face of the statute, the Fourteenth and Fifteenth Amendments are not violated.

Before JONES, BROWN, and WISDOM, Circuit Judges.

JONES, Circuit Judge.

The Legislature of Alabama passed a statute which changed the boundaries of the City of Tuskegee in Macon County of that State, Acts

1957, p. 185. The boundary changes reduced the area of the municipality. The plaintiffs, appellants here, are Negroes. They brought a class suit in the District Court for the Middle District of Alabama against the Mayor, the

members of the City Council, and the Chief of Police of the City of Tuskegee, and the members of the Board of Revenue, the Sheriff, and the Judge of Probate of Macon County, and the City of Tuskegee, alleging that as a result of the realignment of the boundaries most of the Negroes who had formerly lived in the City and substantially all of the Negroes who had been qualified to vote in City elections would no longer reside within the City. No white person residing in the City as previously constituted was excluded from it by the Act. The named plaintiffs, Negroes who had resided within the City limits as they formerly existed but beyond those limits as they are redefined by the statute, for themselves and others of such class, assert in their complaint that they have been deprived of police protection and street improvements, and have been denied the right to vote in municipal elections and participate in the municipal affairs of Tuskegee. It was averred that the purpose of the passage of the statute was to deny and deprive the plaintiffs of the right of franchise and other rights and privileges of citizenship of the City of Tuskegee.

[Relief Sought]

By the prayer of the complaint the plaintiffs asked for a declaration that the Legislative Act, as applied to the plaintiffs, is in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the Fifteenth Amendment. Temporary and permanent injunctions were sought to restrain the defendants from enforcing the statute as to the plaintiffs and those similarly situated, and from denying them the right to participate in municipal elections and to be recognized and treated as citizens of the City of Tuskegee. The defendants filed a motion to dismiss upon the grounds, variously stated, that the courts of the United States cannot inquire into the purpose of enacting or interfere with the carrying out of State legislation fixing the boundaries of municipalities within the State; and that the suit was, in substance, one against the State of Alabama which these plaintiffs could not maintain. The district court granted the motion to dismiss and in its opinion discussed the questions presented, and thus stated its conclusions:

"Thus this Court must now conclude that regardless of the motive of the Legis-

lature of the State of Alabama and regardless of the effect of its actions, in so far as these plaintiffs' right to vote in the municipal elections is concerned, this Court has no authority to declare said Act invalid after measuring it by any yardstick made known by the Constitution of the United States. This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama". [167 F.Supp. 410.]

[Decision Below]

The Court entered a judgment dismissing the action upon the ground that the complaint failed to state a claim against the defendants upon which relief could be granted, and for lack of jurisdiction. From this judgment the plaintiffs have appealed.

A general statement of the powers of States over municipal corporations has been made in these words:

"The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic or unjust, or even abolish them altogether in the legislative discretion, and substitute those which are different. The rights and franchises of such a corporation, being granted for the purposes of government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated. * * * Restraints on the legislative power of control must be found in the constitution of the State, or they must rest alone in the legislative discretion. If the legislative action in these cases operate injuriously to the municipalities or to individuals, the remedy is not

with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot-box all these wrongs." 1 Cooley's Constitutional Limitations, 8th Ed., 393 et seq.

To this rule Professor Cooley notes exceptions but none are here pertinent. A portion of the language above has been quoted with approval by the Supreme Court. *Town of Mount Pleasant v. Beckwith*, 100 U.S. 514, 529, 25 L.Ed 699. With fewer words it has been said:

"The power to create or establish municipal corporations, to enlarge or diminish their area, to reorganize their governments or to dissolve or abolish them altogether is a political function which rests solely in the legislative branch of the government, and in the absence of constitutional restrictions, the power is practically unlimited." 37 Am.Jur. 626, *Municipal Corporations*, § 7.

[Supreme Court Pronouncement]

In an often cited opinion the Supreme Court has thus pronounced governing principles:

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this

may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 46, 52 L.Ed. 151. See *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 39 S.Ct. 526, 63 L.Ed. 1054; *City of Trenton v. State of New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937, 29 A.L.R. 1471.

[Florida Case Quoted]

In a leading Florida case it is stated:

"The existence of the power [of a State legislature to establish, alter, extend, or contract municipal boundaries] is freely conceded. But is that power unlimited, and the exercise of it entirely beyond the reach of judicial review in any and all cases? The weight of authority in this country seems to answer this question in the affirmative, and to hold that the legislative power in this regard is practically plenary and unlimited, in the absence of express constitutional restriction thereof." *State ex rel. Davis v. City of Stuart*, 97 Fla. 69, 120 So. 335, 341, 64 A.L.R. 1307.

It is a general rule that the "power of increase and diminution of municipal territory is plenary, inherent and discretionary in the Legislature, and, when duly exercised, cannot be revised by the courts." Cooley on *Municipal Corporations* 106 § 32. See 16 C.J.S. *Constitutional Law* § 145, p. 706; Cooley's *Constitutional Law* § 145, p. 706; Cooley's *Constitutional Law* § 145, p. 706.

tutional Limitations, *supra*; State ex rel. Davis v. City of Stuart, *supra*.

It is not claimed that any provision of the State Constitution is violated. The Alabama Constitution expressly recognizes the legislative power of "altering or rearranging the boundaries" of municipalities. Ala.Const.Sec. 104(18); *Ensley v. City of Simpson*, 166 Ala. 366, 52 So. 61; State ex rel. Brooks v. Gullatt, 210 Ala. 452, 98 So. 373. Should it be contended that a state constitutional question is presented, such contention should not be submitted, in the absence of diversity of citizenship, to Federal tribunals. We find no necessity to declare the rule that a state legislature may do as it will in altering municipal boundaries unrestrained by any provision of the Federal Constitution to be a rule without exception. We think this case does not present the exception. We need not say, for our purposes here, that there may not be cases where courts can properly inquire as to whether a statute fixing boundaries transcends constitutional limits. We think this is not such a case.

[Rules in Bonds Cases]

Judicial interposition will be sustained where general obligation municipal bonds have been issued and thereafter a change in boundaries has diminished the extent and value of the property subject to tax liens for servicing the bond issue. In such a case the Federal Constitution prevents the contract obligation of the bonds from being impaired by the reduction of the security pledged for their payment. However, the statute contracting the area is not to be declared void. The City's area would be reduced but the City would have a continuing right and be under a continuing duty to levy taxes upon the territory outside, but which was formerly within, its limits as well as upon its remaining area to provide revenue to meet the maturities of interest and principal on the bonds. *Port of Mobile v. Watson*, 116 U.S. 289, 6 S.Ct. 398, 29 L.Ed. 620. Cf. *City of Sour Lake v. Branch*, 5 Cir., 1925, 6 F.2d 355, certiorari denied 269 U.S. 565, 46 S.Ct. 24, 70 L.Ed. 414; *Town of Oneida v. Pearson Hardwood Flooring Co.*, 169 Tenn. 449, 88 S.W.2d 998; 1 Quindry, Bonds and Bondholders 744 § 529.

The members of a municipal corporation, its citizens, are those residing within the municipal boundaries. They and all of them, but none others, are entitled to the benefits, privileges

and immunities and they are subject to the burdens and liabilities of the municipalities. Property within an incorporated city or town is subject to taxation by the corporation. So also, as has been observed, land excluded may be subjected to taxation by the municipality to prevent impairment of a contract obligation. Sojourners must comply with the City's police regulations. When a person removes from a municipal corporation he loses his membership and the rights incident to such membership and this is no less true where the removal is involuntary and results from a change of boundaries than where the resident removes to another place. That this is so does not restrict the legislative power to alter municipal boundaries.

[Legislative Wisdom not Considered]

It is said by Mr. Justice Jackson, a "fundamental tenet of judicial review that not the wisdom or policy of legislation but only the power of the legislature, is a fit subject for consideration by the courts." Jackson, *Struggle for Judicial Supremacy* 81. See *Hunter v. City of Pittsburgh*, *supra*. In the consideration of statutes the courts will refrain from making inquiry into the motives of the legislature, and will not be influenced by the opinions of any or all the members of the legislature, or of its committees or of any other person. 82 C.J.S. Statutes § 354, pp. 745-746. It has recently been stated that "In testing constitutionality 'we cannot undertake a search for motive.' 'If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.'" *Shuttlesworth v. Birmingham Board of Education*, D.C. N.D.Ala.1958, 162 F.Supp. 372, 381, affirmed 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed.2d 145. An attack was made in the Tennessee courts upon an act of the legislature of that State which altered the boundaries of the City of Nashville. The plaintiffs charged that, among other things, the boundaries were arbitrarily drawn with irregular lines and numerous angles which subjected plaintiffs' property to municipal taxation while excluding other property similarly situated in violation of the due process constitutional provisions. It was alleged that the act was conceived and its passage procured for sinister motives for the purpose of assessing the property of the plaintiffs and excluding the property of others, and this was done pursuant

to an agreement between the persons benefited and a few members of the legislature. In holding the allegations insufficient the court said:

"That a bill is inspired by private persons for their own advantage, and to the detriment of others, is clearly not a sufficient reason for holding the law void, when passed. Nor can the courts annul a statute because the legislature passing it was imposed upon and misled by a few of its members in conjunction with interested third parties. If the act in question is unwise and oppressive, the bill may be remedied by repeal or amendment. The courts have nothing to do with the policy of legislation nor the motives with which it is made." *Williams v. City of Nashville*, 89 Tenn. 487, 15 S.W. 364, 366.

[*South v. Peters Reviewed*]

In a case where an issue was presented not wholly dissimilar to that before us, an attack was made on the County Unit System of voting that prevails in Georgia. It was asserted, among other things, that the statute providing for the "System" was unconstitutional because it had the "present effect and purpose of preventing the Negro and organized labor and liberal elements of urban communities, including Fulton County, from having their votes effectively counted in primary elections." It was held by a Three-Judge District Court that the Federal Constitution does not take from states the right to set up their own internal organizations and prescribe the manner of state elections. *South v. Peters*, D.C.N.D.Ga.1950, 89 F.Supp. 672. The Supreme Court affirmed, although a dissenting opinion took the view that the statute abridged the right to vote on account of color in violation of the Fifteenth Amendment. *South v. Peters*, 339 U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834, rehearing denied 339 U.S. 959, 70 S.Ct. 980, 94 L.Ed. 1369.

The enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is, as has been noted, a political function. It is a governmental act. *American Bemberg Corporation v. City of Elizabethton*, 180 Tenn. 373, 175 S.W.2d 535. Hence it is an act of sovereignty performed under a power reserved by the Tenth Amendment, 81 C. J.S. States § 2, p. 858. This univers-

ally recognized sovereign power should not be restricted by prohibiting its exercise where, as an incidence of it, Negroes would be purposely excluded from the municipality and from participation in its affairs.

[*Conclusion and Judgment*]

Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution, although it is alleged that the enactment was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections. Since we have reached this conclusion, it follows that the judgment of the district court must be

Affirmed.

BROWN, Circuit Judge, dissenting.

WISDOM, Circuit Judge, concurring specially.

DISSENT

BROWN, Circuit Judge (dissenting).

Feeling that this decision is wrong, I cannot presume to speak for the Court. But in sounding this respectful dissent from the action of my Brothers who are no less sensitive than I to the compelling obligations of the Constitution, I would suggest that the Court itself is troubled by this decision.

Does the Court really mean to apply the absolute of *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 46, 52 L.Ed. 151? It is sweeping and unequivocal:

"In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

If this is the law, then why does not the opinion end with it? Why does the Court

disavow any purpose to hold that it is a rule without exception?¹

Does the Court really determine that the question of alteration of municipal boundaries is a "political" matter and hence beyond the scrutiny of the Judiciary? If it means this, then why does it emphasize time and again that the discriminatory purpose does not appear on the face of the Alabama Act? If it is a "political" matter beyond judicial scrutiny, then what difference does it make whether the purpose is frankly stated or stealthfully concealed by artful sophistication?²

Does the Court mean to recognize that where the purpose of the Act is patent on its face the constitutional guaranty or prohibition is then sufficient to invest the Judiciary with a power to so declare by an effective order? If the Judiciary has the power to strike down what is plainly forbidden, what is there about the nature of the judicial process, traditional notions of separation of powers, or the doctrine of judicial abstention from "political" matters, that robs the Judiciary of its accustomed role of inquiry and ascertainment of legislative purpose?

[Questions Unanswered]

I do not find the answers to these questions in the Court's opinion. I believe earnestly that analysis will demonstrate that satisfactory answers may not be found either to them, or to others suggested by them. Like analysis will show, I think, that the courts are open to hear and determine the serious charge here asserted.

1. "We find no necessity to declare the rule that a state legislature may do as it will in altering municipal boundaries unrestrained by any provision of the Federal Constitution to be a rule without exception. We think this case does not present the exception. We need not say, for our purposes here, that there may not be cases where courts can properly inquire as to whether a statute fixing boundaries transcends constitutional limits. We think this is not such a case."
2. As much is implied by the Court's statement:

"The enactment by a state legislature of a statute creating, enlarging, diminishing or abolishing a municipal corporation is, as has been noted, a political function. It is a governmental act. *American Bemberg Corporation v. City of Elizabethton*, 180 Tenn. 373, 175 S.W.2d 535. Hence it is an act of sovereignty performed under a power reserved by the Tenth Amendment. 81 C.J.S. 858, States § 2, p. 858. This universally recognized sovereign power should not be restricted by prohibiting its exercise where, as an incidence of it, Negroes would be purposely excluded from the municipality and from participation in its affairs."

The last sentence indicates that purposeful exclusion of Negroes has a "sovereign" or "political" immunity regardless of its patent or latent genesis.

I.

Unlike the inherent ambiguity of a phrase like "due process" or "equal protection" found in the immediately preceding Fourteenth Amendment, the 34 words comprising the Fifteenth Amendment are plain. Their command is clear:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The idea, implicit in the Court's opinion that being a "political" matter the sanction of the constitutional guaranty is to be found in the self-imposed sense of responsibility of the individual states—here Alabama—is a denial of history.

[Slaughter-House Cases Quoted]

"A few years experience satisfied the thoughtful men who had been the authors of the other two Amendments that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

"Hence the 15th Amendment, which declares that 'the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude.' The negro having, by the 14th Amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union.

"We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be im-

pressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made free-men and citizen from the oppression of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." *Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.* (Slaughter-House Cases), 1873, 16 Wall. 36, 71-72, 83 U.S. 36, 71-72, 21 L.Ed. 394.

[District Court Opinion Quoted]

Tested in this light, these statements of the District Court are compelling indeed. As he declared, in dismissing Appellants' complaint,

"Prior to the passage of Act No. 140, the boundaries of the municipality of Tuskegee formed a square, and, according to the complaint . . . contained approximately 5,397 Negroes, of whom approximately 400 were qualified as voters in Tuskegee, and contained approximately 1,310 white persons, of whom approximately 600 were qualified voters in said municipality. As the boundaries are redefined by said Act No. 140, the municipality of Tuskegee resembles a 'sea dragon.' The effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the qualified white voters. Plaintiffs state that said Act is but another device in a continuing attempt to disenfranchise Negro citizens not only of their right to vote in municipal elections and participate in municipal affairs, but also of their right of free speech and press, on account of their race and color." *Gomillion v. Lightfoot*, D.C.M.D.Ala., 1958, 167 F.Supp. 405, 407.

The conclusion and judgment of the District Court, which we have this day affirmed, is "that the complaint fails to state a claim . . . upon which relief can be granted and

that this Court does not have any authority or jurisdiction to declare void this particular duly enacted statute of the State of Alabama." 167 F.Supp. 405, 410. Accordingly, the case must now be measured against the allegations of the complaint which categorically charges purposeful discrimination for race. For, as we have learned from *Conley v. Gibson*, 1957, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80, "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." And for this purpose the complaint must be taken as true. *Glus v. Brooklyn Eastern District Terminal*, 1959, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed. 2d 770, 774.

[Instant Decision's Implications]

Considering the procedural context in which this case now finds itself, the Court has permitted the Legislature of Alabama to simply abolish a substantial part of one of its cities, Tuskegee, and thereby disenfranchise all but four or five of its Negro citizens. Almost as anticipating the existence of this invincible power, the legislature is perhaps presently considering using it to eradicate the entire County of Macon.⁴

3. The District Court puts it squarely on the basis that the "court does not have any authority or jurisdiction." Another thing still unclear in this Court's opinion is whether it takes a like view or whether in the expression "the courts will not hold an act . . . to be invalid . . ." this Court is to be understood as recognizing that it has the power to review—and exercising it—affirmatively finds the act within the constitutional prerogative of Alabama. The Court expresses its conclusion this way: "Our consideration of what we regard to be the applicable rules of law leads us to the conclusion that, in the absence of any racial or class discrimination appearing on the face of the statute, the courts will not hold an act, which decreases the area of a municipality by changing its boundaries, to be invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution, although it is alleged that the enactment was made for the purpose, not appearing in the Act, and with the effect of excluding or removing Negroes from the City and depriving them of the privileges and benefits of municipal membership, including the right to vote in City elections."
4. An amendment to the Alabama Constitution providing that the legislature "may . . . by a majority vote of each house, enact general or local laws . . . reducing the area of, or abolishing, Macon County . . ." was introduced and passed by the 1957 session of the Alabama Legislature as Act

II.

Although to me this is an apt illustration of "burn[ing] the house to roast the pig,"⁵ I agree with much of that said by the Appellees, the District Judge and the majority of this Court. Zoning and districting regulations are primarily for states. Voting regulations are primarily for states. As a general rule, the Constitution of the United States, the Congress, the Federal Courts, and the Executive Branch of the Federal Government are not concerned with such local matters.

This is not to say, however, as the Court's opinion tends to conclude from the Hunter, Beckwith and Laramie Cases,⁶ that the Constitution imposes no limitation upon the actions of the states in these areas.

It is axiomatic that in a federal system the laws of the individual states cannot be supreme. For even in a field reserved expressly to the States or to the people it is the Constitution which assures that. The Constitution so prescribes. Article Six of the Constitution provides that "This Constitution . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Moreover, Alabama, like most states, requires that "All members of the legislature, and all officers, executive and judicial, before they enter upon the execution of the duties of their respective offices . . ." must swear to "support the constitution of the United States . . ." Ala. Const. Art. 16, § 279 (1901).

[*The Constitution's Supremacy*]

The nearly 360 volumes of the United States Reports are full of the historical story of the occasional conflict between what are in all other respects matters of wholly local concern, and some provision of the Constitution. Needless to say, whenever true conflict has in fact existed, the Constitution has always won out. There is

no local matter which is not subject to potential examination for Constitutional defects. To list them all is the task of a case digest or encyclopedia, not a judicial opinion. But a few examples are helpful to illustrate the broad spectrum of constitutional concern.

A mere cursory examination of the following areas will show that they are all typically thought of as matters of nearly exclusive local control. And yet the footnotes indicate some of the familiar cases in which it was determined that, for some reason, the state or local government's treatment was weighed and found constitutionally wanting: local education,⁷ transportation,⁸ and recreation⁹ facilities; athletic contests control;¹⁰ local housing developments;¹¹ state taxation¹² and educational institutions;¹³ what are essentially state judicial procedure matters like admission to the state bar,¹⁴ appointment of

7. *Aaron v. Cooper* (Cooper v. Aaron), 1958, 358 U.S. 5, 1, 4, 78 S.Ct. 1399, 1401, 1410, 3 L.Ed.2d 3, 5, 17 (Little Rock); *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, Annotation 98 L.Ed. 882, 38 A.L.R.2d 1180; supplemental opinion, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083; also companion case, *Bolling v. Sharpe*, 1954, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (the original "school segregation cases").

8. *Gayle v. Browder*, 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, affirming per curiam, D.C.M.D.Ala., 1956, 142 F.Supp. 707 (Montgomery busses).

9. *Beal v. Holcombe*, 5 Cir., 1951, 193 F.2d 384, certiorari denied, 1954, 347 U.S. 974, 74 S.Ct. 783, 98 L.Ed. 1114 (golf course); *City of Fort Lauderdale v. Moorhead*, 5 Cir., 1957, 248 F.2d 544, affirming per curiam, D.C.S.D.Fla.1957, 152 F.Supp. 181 (same); *New Orleans City Park Improvement Ass'n v. Detiege*, 5 Cir., 1958, 252 F.2d 122 (park); *Kansas City, Mo. v. Williams*, 8 Cir., 1953, 205 F.2d 47, affirming, D.C.W.D.Mo., 1952, 104 F.Supp. 848, certiorari denied 1953, 346 U.S. 826, 74 S.Ct. 45, 98 L.Ed. 351 (swimming pool).

10. *State Athletic Commission v. Dorsey*, 1959, 359 U.S. 533, 79 S.Ct. 1137, 3 L.Ed.2d 1028, affirming per curiam D.C.E.D.La.1959, 168 F.Supp. 149 [Judge Wisdom] (statute barring interracial athletic contests).

11. *Banks v. Housing Authority of City and County of San Francisco*, 120 Cal.App.2d 1, 260 P.2d 668, certiorari denied 1954, *Holcombe v. Beal*, 347 U.S. 974, 74 S.Ct. 784, 98 L.Ed. 1114 (public low rent housing).

12. *Spector Motor Service, Inc. v. O'Connor*, 1951, 340 U.S. 602, 71 S.Ct. 506, 95 L.Ed. 573.

13. *Sweatt v. Painter*, 1950, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (law school); *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (same).

14. *Konigsberg v. State Bar of California*, 1957, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810; *Schwartz v. Board of Bar Examiners*, 1957, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796.

No. 526, p. 720. It was subsequently submitted to a referendum, and approved, December 17, 1957. The Act is reported at 3 Race Rel. L. Rep. 357 (1958).

5. *Butler v. State of Michigan*, 1957, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed. 2d 412 (per Frankfurter, J.).

6. *Hunter v. City of Pittsburgh*, 1907, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151; *Town of Mount Pleasant v. Beckwith*, 1880, 100 U.S. 514, 25 L.Ed. 699; *Commissioners of Laramie County v. Com'rs of Albany County*, 1876, 92 U.S. 307, 23 L.Ed. 552, D.C., 167 F.Supp. 405, 408-409.

counsel,¹⁵ enforcement of restrictive covenants,¹⁶ payment of filing fees¹⁷ and furnishing of transcripts¹⁸ for appeal, and the selection of jurors;¹⁹ and even a governor's control of his state's militia,²⁰ and control of highway safety.²¹

[*Constitution Must Be Regarded*]

One would be hard-pressed to find an area of "exclusive state action" which has or could not, in some way, by legislative design or administrative execution, be found to be violative of some constitutional provision. This has nothing to do with the occasional strife surrounding overlapping congressional and state legislation. No one here contends that Congress has the right to redistrict Tuskegee or prescribe the qualifications for voting in its municipal elections. But the fact that these are solely, or primarily, the initial concerns of Alabama alone does not mean that when it acts it may act without regard for the Constitution.

The Supreme Court expressed the standard in *Cooper v. Aaron*, note 7, *supra*, when they said,

"It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action." (Emphasis supplied.) 358 U.S. 1 at page 19, 78 S.Ct. 1401, at page 1410 [3 L.Ed.2d 5 at page 17].

Of course, the same thing could be said of state regulation of voting and zoning.

15. *Powell v. State of Alabama*, 1932, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158.
16. *Barrows v. Jackson*, 1953, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, Annotation 97 L.Ed. 1602; *Shelley v. Kraemer*, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441.
17. *Burns v. State of Ohio*, 1959, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209.
18. *Griffin v. People of State of Illinois*, 1956, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891.
19. *Cassell v. State of Texas*, 1950, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; *Smith v. State of Texas*, 1940, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; *United States ex rel. Goldsby v. Harpole*, 5 Cir., 1959, 263 F.2d 71.
20. *Sterling v. Constantin*, 1932, 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375; and see *Cooper v. Aaron*, note 7, *supra*.
21. *Bibb v. Navajo Freight Lines, Inc.*, 1959, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (truck mud guard regulations).

In *Sterling v. Constantin*, note 20, *supra*, the Supreme Court was confronted with the contention that,

"* * * the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government." 287 U.S. 378, at page 397, 53 S.Ct. 190 at page 195.

A contention, it might be noted, which is not altogether dissimilar from that advanced here as to the omnipotence of the Alabama legislature. The assertion was quickly disposed of by the Court in the very next sentence.

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, * * *." *Id.*, at pages 397-398, 53 S.Ct. at page 195.

III.

Nothing in the *Hunter*, *Beckwith* and *Laramie* municipal redistricting cases, note 6, *supra*, primarily relied upon by the majority and the District Court, alters this view.

Indeed, in those very cases the Supreme Court acknowledged that some limitations were to be imposed upon the state's action.

"Text writers concede almost unlimited power to the State Legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. [citations]

"Concessions of power to municipal corporations are of high importance; but they are not contracts, and, consequently, are subject to legislative control without limitation, unless the Legislature oversteps the limits of the Constitution." (emphasis supplied.) *Mount Pleasant v. Beckwith*, note 6, *supra*, 100 U.S. 514, 533, 25 L.Ed. 699.

["*Extravagani Dicta*" not Binding]

Moreover, they are not recent cases. Only one was decided in the Twentieth Century, and that over 50 years ago. Racial discrimination was in no way involved. The problems involved concerned property: higher taxes for the annexed city (Hunter), and the liability of a newly created county for the extinguished county's debts (Beckwith and Laramie). Extravagant dicta, taken out of its property context, that "the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States"²² should not now be spread, some 52 years later, to cover and control our determination of issues of a different area, and of another era.²³

IV.

Of course it is true that there are many and varied areas of potential controversy which the courts have held to be, for one reason or another, beyond the limits of judicial relief. These include, for example, the constitutional "guaran-

tee to every State in this Union a Republican Form of Government"²⁴ (Art. IV, § 4), the congressional regulation of Indian tribes,²⁵ the legislative and executive control of foreign relations, recognition of foreign governments, and the war powers,²⁶ control of civilian and military appointing power,²⁷ or for that matter, the inherent wisdom of any executive or legislative policy or specific action,²⁸ as, for example, taxation.²⁹

[*Taxpayers Cases Reasoning Inapplicable*]

An outstanding illustration is the Supreme Court's traditional reluctance to grant taxpayers relief against governmental action. As that Court declared in *Commonwealth of Massachusetts v. Mellon*, 1923, 262 U.S. 447, 487, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078, regarding a citizen's attack upon a federal appropriation bill,

"His interest in the moneys of the treasury . . . is shared with millions of others If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be main-

22. *Hunter v. City of Pittsburgh*, note 6, supra, 207 U.S. 161, 179, 28 S.Ct. 40, 52 L.Ed. 151.

23. I make no apologies for the view that the business of judging in constitutional fields is one of searching for the spirit of the Constitution in terms of the present as well as the past, not the past alone. I find respectable authority in the words of Chief Justice Hughes in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 442, 54 S.Ct. 231, 242, 78 L.Ed. 413:

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a constitution we are expounding' (*McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579); 'A constitution intended for ages to come, and, consequently, to be adapted to the various crises of human affairs.' When we are dealing with the words of the Constitution, said this Court in [*State of*] *Missouri v. Holland*, 252 U.S. 416, 433, 40 S.Ct. 382, 64 L.Ed. 641, 'We must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'"

24. *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 1912, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377; *Taylor v. Beckham*, 1900, 178 U.S. 548, 20 S.Ct. 1009, 44 L.Ed. 1187; *Luther v. Borden*, 1849, 7 How. 1, 42, 48 U.S. 1, 42, 12 L.Ed. 581.

25. *Lone Wolf v. Hitchcock*, 1903, 187 U.S. 553, 565, 23 S.Ct. 216, 47 L.Ed. 299.

26. *Harisiades v. Shaughnessy*, 1952, 342 U.S. 580, 588-589, 72 S.Ct. 512, 96 L.Ed. 586; *Hirabayashi v. United States*, 1943, 320 U.S. 81, 93, 63 S.Ct. 1375, 87 L.Ed. 1774; *United States v. Curtiss-Wright Export Corp.*, 1936, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255; *Oetjen v. Central Leather Co.*, 1918, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726; *Neely v. Henkel*, 1901, 180 U.S. 109, 21 S.Ct. 302, 45 L.Ed. 448; *Kennett v. Chambers*, 1852, 14 How. 38, 50-51, 55 U.S. 38, 50-51, 14 L.Ed. 316.

27. *Orloff v. Willoughby*, 1953, 345 U.S. 83, 90, 73 S.Ct. 534, 97 L.Ed. 842.

28. *Trop v. Dulles*, 1958, 356 U.S. 86, 114, 120, 78 S.Ct. 590, 2 L.Ed.2d 630 (dissenting opinion).

29. *Commonwealth of Massachusetts v. Mellon*, 1923, 262 U.S. 447, 487-488, 43 S.Ct. 597, 67 L.Ed. 1078.

tained. * * * The party who invokes the power [of courts to declare acts unconstitutional] must be able to show, not only that the statute is invalid, but that he * * * is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Such reasoning is hardly applicable here. Appellants' complaint is not one "in common with people generally"—only those whose skin is black. And their suffering is not indefinite: one day voting citizens of Tuskegee, the next they have been deprived of both vote and village.

Nor do the two voter cases applying judicial abstention because the cases were political in nature either justify or compel a different result.

[*Colegrove v. Green Considered*]

In *Colegrove v. Green*, 1946, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, Illinois citizens sought a redistricting of the state because of the gross inequality inherent in a range of population in congressional districts of from 112,116 to 914,000. The Court affirmed the dismissal of the complaint "because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." 328 U.S. 549, 552, 66 S.Ct. 1198, 1199, 90 L.Ed. 1432. Again, however, this case involved no consideration of racial issues. The conflict was between rural and urban Illinois, or political parties, not races. And, although some citizens only had one-ninth the vote of others, they were all still permitted to engage in the formality of balloting. It may also be noted that this was not a determination that the districting was constitutional, that the three dissenters felt that the Court should have decided the case, and against the constitutionality of the districting complained of, that Mr. Justice Rutledge's concurring opinion expressed the view that the Court has the power to provide relief in such cases but that here "the cure sought may be worse than the disease," 328 U.S. 549, 566, 66 S.Ct. 1198, 1209, 90 L.Ed. 1432, and that the opinion has come under some criticism. See, e. g., Lewis, *Legislative Apportionment and the Federal Courts*, 71 *Harv.L.Rev.* 1057 (1958).

A case of disenfranchisement of Negroes by redistricting has apparently never before arisen. But, as I shall point out in detail, the right of Negroes to vote equally with whites has been jealously guarded by the Supreme Court.

[*Georgia Voting Cases*]

Even in *Breedlove v. Suttles*, 1937, 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252, in which the Court found that Georgia's poll tax did not deny any privilege or immunity of the 14th Amendment, the opinion notes that the otherwise complete freedom of a state to "condition suffrage as it deems appropriate" is "restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution * * *." 302 U.S. 277, 283, 58 S.Ct. 205, 208, 82 L.Ed. 252.

And although the brief per curiam in *South v. Peters*, 1950, 339 U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834, affirming the dismissal of a petition attacking Georgia's county unit voting system for primary elections as violative of the Fourteenth and Seventeenth Amendments, harks back to *Colegrove v. Green*, supra, and the categorization of "cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions," 339 U.S. 276, 277, 70 S.Ct. 641, 642, 94 L.Ed. 834, it too, does not completely disenfranchise any citizen, is primarily concerned with the urban-rural conflict, and carries a strong dissent, that begins by acknowledging for all, "I suppose that if a State reduced the vote of Negroes, Catholics, or Jews so that each got only one-tenth of a vote, we would strike the law down."

V.

When a racial discrimination voting issue is clearly posed the Court has evidenced little concern for judicial abstention in "cases posing political issues." Mr. Justice Holmes provided this frontal attack for the Court in the "white primary case" of *Nixon v. Herndon*, 1927, 273 U.S. 536, 540, 541, 47 S.Ct. 446, 71 L.Ed. 759 "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been

doubted for over two hundred years * * *. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." In *Smith v. Allwright*, 1944, 321 U.S. 649, 64 S.Ct. 757, 761, 88 L.Ed. 987, the Court acknowledged that, "Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution * * *." 321 U.S. 649, 657, 64 S.Ct. 757, 762, 88 L.Ed. 987, and then went on to note that, "the Fifteenth Amendment specifically interdicts any denial or abridgement by a state of the right of citizens to vote on account of color," (Id.) and found the Texas white primary procedure unconstitutional. Its teaching was applied to strike down the Jaybird Association in *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152. Mr. Justice Black reviewed many of the predecessor cases, took note of the fact that the Fifteenth Amendment has been held "self-executing" and declared:

"The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy, obviously applicable to the right of Negroes not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local." 345 U.S. at page 467, 73 S.Ct. at page 812.

[Civil Rights Acts]

Not only have the courts uniformly enforced Negro voting rights under the Constitution, but Congress pursuant to the constitutional mandate has for nearly 100 years specifically provided for judicial enforcement of civil rights by legislation.³⁰ See, e. g., 18 U.S.C.A. §§ 241—

30. 18 U.S.C.A. § 241:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise of enjoyment of any right or privilege so secured—

"They shall be fined not more than \$5,000 or

243, 28 U.S.C.A. §§ 1343, 1443, 42 U.S.C.A. §§ 1981—1995.

It is of little significance that the Alabama Tuskegee redistricting act under consideration does not, as this Court so greatly emphasizes, demonstrate on its face that it is directed at the Negro citizens of that community. If the act is discriminatory in purpose and effect, "whether accomplished ingeniously or ingeniously [it] cannot stand." *Smith v. State of Texas*, note 19, *supra*, 311 U.S. 128, 132, 61

imprisoned not more than ten years, or both."

18 U.S.C.A. § 242:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

18 U.S.C.A. § 243:

Providing that there shall be no discrimination in the selection of jurors and setting a \$5,000 fine for violation.

28 U.S.C.A. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." (emphasis supplied)

Paragraph (4) added Sept. 9, 1957, 71 Stat. 637. Legislative history reported at 2 U.S. Code Cong. & Adm. News, pp. 1966, 1974 (1957).

28 U.S.C.A. § 1443:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for

S.Ct. 164, 166, 85 L.Ed. 84. Or, as the Court said in *Lane v. Wilson*, 1939, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281, another case of voting discrimination "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Means of disenfranchising Negroes, like fraud, have historically been "as old as falsehood and as versatile as human ingenuity." *Weiss v. United States*, 5 Cir., 1941, 122 F.2d 675, 681, certiorari denied 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550. And "in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the farmers were not familiar." *United States v. Classic*, 1941, 313 U.S. 299, 316, 61 S.Ct. 1031, 1038, 85 L.Ed. 1368.

VI.

The effect of the act is clear. The District Court so found. "As the boundaries are re-defined by said Act No. 140, the municipality of Tuskegee resembles a 'sea dragon.' The effect of the Act is to remove from the municipality of Tuskegee all but four or five of the qualified Negro voters and none of the qualified white voters." [167 F.Supp. 407].

Even if the procedural effect of a motion to dismiss for failure to state a claim—admission of allegations—is disregarded the sheer statistics alleged may demonstrate a prima facie purpose of discrimination.

[Statistics Noted]

It might well be, as was true in *United States ex rel. Goldsby v. Harpole*, 5 Cir., 1959, 263

refusing to do any act on the ground that it would be inconsistent with such law."

42 U.S.C.A. §§ 1981-1995

1981 (equal rights)

1982 (equal property rights)

1983 (action for deprivation of rights)

1984 (reviewable by Supreme Court)

1985 (action for conspiracy to interfere with civil rights)

1986 (action for failure to prevent interference)

1987 (officers may institute proceedings)

1988 (proceedings in conformity with common law)

1989 (additional commissioners)

1990 (penalty for failure to execute warrant)

1991 (provision for \$5 fee for arrests)

1992 (President may request more speedy proceedings)

1993 (repealed)

1994 (peonage abolished)

1995 (new; fine and imprisonment for criminal contempt)

F.2d 71, that if Appellants were ever allowed the opportunity of a trial that "the naked figures [would themselves] prove startling enough." 263 F.2d 71, 78. In that case involving exclusion of Negroes from juries, the fact that 57% of the population of Carroll County, Mississippi was Negro and yet no county official "could remember any instance of a Negro having been on a jury list of any kind," without refutation by the State of the reason for such a result was considered enough to prove systematic exclusion of Negroes from the juries of that county. This was the standard of proof of a prima facie case established by such cases as *Norris v. State of Alabama*, 1935, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074, and *Hernandez v. State of Texas*, 1954, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866. And in *United States v. State of Alabama*, 5 Cir., 1959, 267 F.2d 808, this Court took note of the allegations that in Macon County, Alabama, the fact that 97% of the eligible whites were registered and only 8% of the 14,000 eligible Negroes resulted in the fact that whites could outvote Negroes nearly three to one and was at least some evidence, if not proof, of discrimination in registration. 267 F.2d 808, note 3. Perhaps the fact that in the present case the Act in question excludes 99% of the 400 Negro voters from the City of Tuskegee and yet not one single one of the 600 white voters will likewise be considered on the trial as proof enough of the discriminatory and unconstitutional purpose of the Act. But it is again well to point out that the adequacy of the proof in this case is not presently before us as we consider it on the basis of the complaint alone.

VII.

We need not be that "blind" Court that Mr. Chief Justice Taft described as unable to see what "all others can see and understand . . ." *Bailey v. Drexel Furniture Co.* [Child Labor Tax Case], 1922, 259 U.S. 20, 37, 42 S.Ct. 449, 450, 66 L.Ed. 817. Cited in *United States v. Butler*, 1936, 297 U.S. 1, 61, 56 S.Ct. 312, 80 L.Ed. 477; *United States v. Rumely*, 1953, 345 U.S. 41, 44, 73 S.Ct. 543, 97 L.Ed. 770; *Uphaus v. Wyman*, 1959, 360 U.S. 72, 79 S.Ct. 1040, 3 L.Ed. 2d 1090 (dissenting opinion 79 S.Ct. 1055). "[T]here is no reason why [we] should pretend to be more ignorant or unobserving than the rest of mankind." *Affiliated Enterprises v. Waller*, 1 Terry 28, 1 Del. 28, 5 A.2d 257, 261. How it can be suggested that we should, for some rea-

son, not make inquiry in this case is a mystery to me. Many cases could be cited but the most recent example will do. A little over a month ago, in deciding *Harrison v. N. A. A. C. P.*, 1959, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152, the Supreme Court took note of the District Court's findings that the acts there in question were passed "to nullify as far as possible the effect of the decision of the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, (74 S.Ct. 686, 98 L.Ed. 873) * * * as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." 360 U.S. 167, 175, 79 S.Ct. 1025, 1030, quoting from *N. A. A. C. P. v. Patti*, D.C.E.D.Va.1958, 159 F.Supp. 503, 511, 515. The dissenting opinion notes the same findings, 360 U.S. 167, 182, 79 S.Ct. 1033, and refers to *Guinn v. United States*, 1915, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, and the celebrated Alabama case of *Schnell v. Davis*, 1949, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093, affirming per curiam, D.C.S.D.Ala.1949, 81 F.Supp. 872. The "legislative setting" surrounding the statute in the latter case was also alluded to in another case decided the same day. *Lassiter v. Northampton Election Board*, 1959, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072. In *Guinn* the Court observed that an Oklahoma "Grandfather Clause" statute could have "no discernible reason other than the purpose to disregard the prohibitions of the [Fifteenth] Amendment," 238 U.S. 347, 363, 35 S.Ct. 926, 931, 59 L.Ed. 1340, although the statute did not specifically declare as its purpose the disenfranchisement of Negroes. The District Court opinion in the *Schnell v. Davis* case discusses the legislative background of an "understand and explain * * * the Constitution" registration requirement statute for three pages, 81 F.Supp. 872, 878-881, and concludes, at pages 880, 881:

"The defendants argue that the Boswell Amendment is not 'racist in its origin, purpose or effect,' but, as has already been illustrated, a careful consideration of the conditions existing at the time, and of the circumstances and history surrounding the origin and adoption of the Boswell Amendment and its subsequent application, demonstrate that its main object was to restrict voting on a basis of race or color. That its purpose was such is further illustrated by the campaign material that was used to secure its adoption. * * * We cannot ignore

the impact of the Boswell Amendment upon Negro citizens because it avoids mention of race or color; 'To do this would be to shut our eyes to what all others than we can see and understand.'"

[Legislature's Motive and Purpose]

And this Court has taken note that such inquiry into motive and purpose was a main theme of the *Davis* case. *Orleans Parish School Board v. Bush*, 5 Cir., 1957, 242 F.2d 156, 165.

Of course, here, as in *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, supra, the effect of the statute is not only a demonstration of its purpose but is enough to demonstrate its unconstitutionality standing alone. As Justice Black stated for three members of the Court,

"Whether that was due to negligence or was a wilful effort to deprive some citizens of an effective vote, the admitted result is that the Constitutional policy of equality of representation has been defeated." 328 U.S. 549, 572, 66 S.Ct. 1198, 1212, 90 L.Ed. 1432.

VIII.

The District Court has quoted, and my Brothers have echoed, language from cases to the effect that legislative motive cannot be inquired into. E. g., *Doyle v. Continental Ins. Co.*, 1876, 94 U.S. 535, 24 L.Ed. 148; *Shuttlesworth v. Birmingham Board of Education*, D.C.Ala.1958, 162 F.Supp. 372. It is necessary to ascertain precisely what they mean by this discussion and quotations. Of course, at this late date, to "overrule" the principle of statutory interpretation would be somewhat like overruling the principle of stare decisis—equally as impossible and undesirable. It is so firmly established—and for so long—that a mere quotation from *Corpus Juris Secundum* is adequate to make the point.

"Since the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the *intention* or *purpose* of the legislature as expressed in the statute." 82 C.J.S. Statutes § 321 (1953). (Emphasis supplied.)

[Judiciary's Concern with Purpose]

What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary. Obviously the Legislature of Alabama could have had the purpose of discriminating against Negro voters. Many states have had such purpose as the cases discussed in Part V, *supra*, attest. All that Doyle can mean is that in the judicial process of ascertaining legislative purpose and intention the individual motives³¹ and expression of the individual members is not pertinent. But where the collective purpose and intention of the body is expressly stated or is ascertained on a trial by the exercise of traditional rules of statutory construction in the light of record facts, the judicial ascertainment and declaration of that purpose and intention is not prohibited by the fact that individual legislators, either in legislative chambers or through the press, may have uttered statements of startling candor.

Of course, to say that "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into," *Doyle v. Continental Ins. Co.*, *supra*, 94 U.S. 535, 541, 24 L.Ed. 148, quoted in *Shuttlesworth v. Birmingham Board of Education*, *supra*, 162 F.Supp. 372, 381, is to beg the question. If the sole and exclusive legislative purpose is to deprive citizens of a state of their constitutional rights then the state does not have "the power to do [that] act." Naturally, once this unconstitutional purpose is ascertained, and it is determined that the act is unconstitutional and beyond the power of a state legislature to enact, then it is unnecessary and unwise to try to find *why* the legislature harbored this purpose,

31. For an interesting discussion of the distinction between inquiries into legislative "motive" and legislative "purpose" see *N.A.A.C.P. v. Patty*, D.C.E.D. Va. 1958, 159 F.Supp. 503, 515 n. 6, vacated and remanded for consideration by Virginia courts, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152.

In ordinary usage the shadings of the three terms are subtle. Webster's New International Dictionary (2d ed. 1954): Purpose: "That which one sets before himself as an object to be attained; the end or aim to be kept in view in any plan, measure, exertion or operation; design; intention." Intention: "A determination to act in a certain way or to do a certain thing; purpose; design; as, an *intention* to go to Rome." Motive: "That within the individual, rather than without, which incites him to action; any idea, need, emotion, or organic state that prompts to an action."

to psychoanalyze them individually or collectively, and to try and verbalize the *motive* which prompted them to action.

[States Subject to Restraints]

This was recognized in *Doyle*, *supra*, when the Court made this almost self-defeating pronouncement: "The State of Wisconsin * * * is a sovereign State, possessing all the powers of the most absolute government in the world." 94 U.S. 535, 541, 24 L.Ed. 148. That this "most absolute government in the world" was nevertheless subject to some restraints was acknowledged by the parenthetical phrase elipsed purposefully from the quotation just made that "(except so far as its connection with the Constitution and laws of the United States alters its position)" Wisconsin is an absolute sovereign state.

Doyle like Hunter is not really then an aid to decision. Each represents only the result once it has been concluded that the particular act does not offend the Constitution. Each is a sweeping generalization, the effect of which would be to supplant all constitutional guarantees if literally applied.

IX.

If the Courts are not open to perform the traditional judicial function of ascertaining legislative purpose and intent, then these appellants stand helpless before the law so that, as to the Fifteenth Amendment, in the memorable words of Chief Justice Marshall, " * * * the declaration that the Constitution * * * shall be the supreme law of the land, is empty and unmeaning declamation." *M'Culloch v. Maryland*, 4 Wheat. 316, 433, 4 L.Ed. 579, 608. The suggestion, implicit if not expressed, that "for protection against abuses by Legislators the people must resort to the polls, not to the Court." *Munn v. State of Illinois*, 1877, 94 U.S. 113, 134, 24 L.Ed. 77; *Williamson v. Lee Optical of Oklahoma*, 1955, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563, is here unavailing.

[No Relief at Polls]

For there can be no relief at the polls for those who cannot register and vote. Significantly the complaint in this case further alleged: "Macon County had no Board of Registrars to qualify applicants for voter registration for more than

eighteen months, from January 16, 1956 to June 3, 1957. Plaintiffs allege that the reason for no Macon County Board of Registrars is that almost all of the white persons possessing the qualification to vote in said County are already registered, whereas thousands of Negroes, who possess the qualifications, are not registered and cannot vote." It was this fact, incidentally, which gave rise to the necessity of the dismissal of a cause of action against the Board of Registrars of Macon County for discriminatory practices in registration. *United States v. State of Alabama*, 5 Cir., 1959, 267 F. 2d 808. In Macon County, of which Tuskegee is a geographical part, neither the Constitution nor Congress nor the Courts are thus far able to assure Negro voters of this basic right.

That this has occurred demonstrates, I think, that the Fifteenth Amendment contemplated a judicial enforcement of its guaranties against either crude or sophisticated action of states seeking to subvert this new right.

[Power to Pierce Veil]

If the force of the ballot was to be the sole sanction for the effectual enforcement of the constitutional guaranty, it really created no right and imposed no prohibition. For all that a recalcitrant state need do is neglect the implementing of its own election machinery. If a Court may strike down a law which with brazen frankness expressly purposes a rank discrimination for race, it has—and must have—the same power to pierce the veil of sham and, in that process, judicially ascertain whether there is a proper, rather than an unconstitutional, purpose for the act in question.

The Court denies the existence of that power. The Constitution is left to a majority of the Alabama Legislature.

X.

As Mr. Justice Frankfurter has recently said elsewhere, "The problem represented by this case is as old as the Union and will persist as long as our society remains a constitutional federalism." *Irvin v. Dowd*, 1959, 359 U.S. 394, 79 S.Ct. 825, 833, 3 L.Ed.2d 900. State Legislatures are accorded, and rightfully so, great respect and a far ranging latitude in their legislative programs. Occasionally there comes the time, however, when legislation oversteps its bounds. Then "it must * * * yield to an authority that is

paramount to the State." *State of Wisconsin v. State of Illinois*, 1930, 281 U.S. 179, 197, 50 S.Ct. 266, 267, 74 L.Ed. 799 (per Holmes, J.).

In such times the Courts are the only haven for those citizens in the minority. I believe this is such a time.

I respectfully dissent.

* * *

CONCURRING OPINION

WISDOM, Circuit Judge (concurring).

I concur fully in the majority opinion. However, the gravity of the issue, the gulf between the majority and dissenting opinions, and a few sharp quilllets in the dissent impel me to make some observations on the application to the instant case of the doctrine of judicial abstention in political cases.

I.

The plaintiffs propose a cure worse than the disease. The Court therefore should withhold the exercise of its equity powers. That was Mr. Justice Rutledge's view in an analogous situation. *Colegrove v. Green*, 1946, 328 U.S. 549, 566, 66 S.Ct. 1198, 90 L.Ed. 1432. That is my view in this case.

An attempt by the federal judiciary to control a state legislature's right to fix the boundaries of a political subdivision is an intrusion of national courts in the polity of a state that in a federal system carries consequences even more serious and far-reaching than the partial disfranchisement of plaintiffs unable to vote in municipal elections because by legislative definition their voting district is not in a municipality. There are other considerations. The plaintiffs ask for something courts cannot give. Courts, any courts, are incompetent to remap city limits. And any decree in this case purporting to give relief would be a sham: the relief sought will give no relief.

[Importance of the Vote]

There is an obvious reply: in a democratic country nothing is worse than disfranchisement. And there is no such thing as being just a little bit disfranchised. A free man's right to vote is a full right to vote or it is no right to vote. Perhaps, so, but in similar situations—to me they are similar—the United States Supreme Court has made no such reply. Instead, in at least two de-

cisions the Supreme Court declined jurisdiction when the relief from partial disfranchisement would require federal courts to intrude in the internal structure and organization of the government of a state. *Colegrove v. Green*, 1946, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432; *South v. Peters*, 1950, 339 U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834.

When Illinois partially disfranchised the citizens in its seventh congressional district by gerrymandering¹ away ninety per cent of their effective vote as against the vote of Illinois citizens in the fifth congressional district, the Court declined to interfere. *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432. In congressional elections, therefore, 100,000 votes may equal 900,000 votes, and a thirty-five per cent minority may outvote a sixty-five per cent majority (over the state as a whole). Georgia, by the county-unit device, disfranchises citizens of Fulton County (Atlanta) by ninety-nine per cent as against citizens in certain rural counties.² When the constitutionality of the system was attacked in the Supreme Court, again the Court held that federal courts should not interfere. *South v. Peters*, 339 U.S. 276, 70 S.Ct. 641, 94 L.Ed. 834.

[Partial Disenfranchisement]

I can see no difference between partially disfranchising negroes and partially disfranchising Republicans, Democrats, Italians, Poles, Mexican-Americans, Catholics, blue-stocking voters, industrial workers, urban citizens, or other groups who are euchered out of their full suffrage because their bloc voting is predictable and their propensity for propinquity or their residence in certain areas, as a result of social and economic pressures, suggests the technique of partial disfranchisement by gerrymander or malapportionment. I can see no difference between depriving negroes of the right to vote in municipal elections in Tuskegee and not counting at their full value votes cast in certain districts in Illinois in a congressional election or votes cast in certain counties in Georgia in a state election. The dissenting justices in *Colegrove v. Green*

and in *South v. Peters* found no sound distinction between those cases and the negro-voting cases.

[*Colegrove and South Cases*]

Colegrove v. Green and *South v. Peters* may be distinguishable at the periphery. At the center these cases and the instant case are the same. In the respect that *Colegrove v. Green* involved congressional districts, there was more reason for federal courts to intervene in Illinois' gerrymandering affecting federal elections than there would be to intervene in Alabama's gerrymandering that affects only municipal elections.

No one thinks that in *Colegrove v. Green* and *South v. Peters* the Supreme Court gave its constitutional blessing to partial disfranchisement. The Court did not reach the constitutional question. The Supreme Court was willing to assume that malapportionment was unconstitutional. "The Constitution", said Mr. Justice Frankfurter for the majority in *Colegrove v. Green*, "has many commands that are not enforceable by the courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."³ In effect, the suit was "an appeal to the federal courts to reconstruct the electoral process of Illinois". Mr. Justice Frankfurter stated: "[T]he petitioners ask of this Court what is beyond its competence to grant. . . . [T]his Court, from time to time, has refused to intervene in controversies . . . because due regard for the effective working of our Government revealed the issue to be of a peculiarly political nature and therefore not meet for judicial determination." Mr. Justice Rutledge, concurring, stated:

"[The Court has] power to afford relief

1. The Supreme Court of Illinois invalidated a 1931 reapportionment and ordered a return to the statute of 1901. *Moran v. Bowley*, 1932, 347 Ill. 148, 179 N.E. 526. Legislative inaction resulted in a gerrymander as effective as any gerrymander created by legislative action reshuffling district lines.
2. For a defense of the system see Henson, *The County Unit System is Constitution*, 14 Ga.Bar J. 22, (1951).

3. Mr. Justice Frankfurter continued: "Thus, 'on Demand of the executive Authority,' Art. IV, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. *Commonwealth of Kentucky v. Dennison*, 24 How. 66, 16 L.Ed. 717. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion. *State of Mississippi v. Johnson*, 4 Wall. 475, 18 L.Ed. 437. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Colegrove v. Green*, 328 U.S. 549, 556, 66 S.Ct. 1198, 1201, 90 L.Ed. 1432.

in a case of this type. * * * But the relief it seeks pitches this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily or to accept the alternative of electing representatives from Illinois at large in the forthcoming elections. * * *

If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights in important ways by vesting large measures of control in the political subdivisions of the government and the state. * * * I think, therefore, the case is one in which the Court may properly, and should decline to exercise its jurisdiction."

In *South v. Peters*, 1950, 339 U.S. 276, 70 S.Ct. 641, 642, 94 L.Ed. 834, a majority of the Supreme Court considered that the holding warranted only a short per curiam opinion: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."

[*Cherokee Nation Case*]

Long before these cases the Cherokee Nation asked for an injunction to restrain the State of Georgia and its officials from asserting certain rights and powers over the people of the Cherokee Nation. In defiance of a treaty between the United States and the Cherokee Nation, Georgia had passed laws dividing the Indian territory into districts and subjecting the Cherokees to the jurisdiction of the state. The Cherokees had the sympathy of almost all Americans. They had no possible haven but the United States Supreme Court. The Court refused to take jurisdiction. *Cherokee Nation v. State of Georgia*, 1831, 5 Pet. 1, 30 U.S. 1, 8 L.Ed. 25. In the opinion for the Court, Chief Justice John Marshall went out of his way to write, by way of dictum:

"If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. * * * A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? * * * The bill requires us to control the Legislature of Georgia, and

to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

II.

With due deference to my able associate, it seems to me that the rhetorical questions in the opening paragraphs of the dissent assume a process of reaching a decision that is inapplicable to political cases. In political cases there are few absolutes and few either-or questions. There may be some matters that clearly fall within the exclusive control of the executive or the legislative branches of government or controversies that these political departments manifestly may settle more appropriately than the judicial department. Courts then apply the doctrine of abstention almost automatically. But since every official act is political in a sense, in most cases courts are driven to inquire. How political? And what are the consequences of granting or denying the relief requested? Because of this and because discretionary equitable powers usually are invoked, courts have considered it proper to take a pragmatic approach and to weigh a variety of considerations in reaching a decision, not stopping, for example, with the flat statement that the issue is political and non-justiciable.⁴ A weighing of practical considerations along with broad principles may blur the line between no-jurisdiction and jurisdiction-but-abstention, yet it has characterized political cases since *Luther v. Borden*, 1849, 7 How. 1, 48 U.S. 1, 12 L.Ed. 581.

4. In *Colegrove v. Green*, for example, the Court attached importance to these considerations: the court lacked satisfactory criteria for a judicial determination; the basis for the suit was not a private wrong, but a wrong suffered by Illinois as polity; no court can affirmatively remap the Illinois districts; it is hostile to a democratic system to involve the judiciary in the politics of the people; regard for the Constitution as a viable system precludes judicial correction, since authority for dealing with the problem resides first with Congress and ultimately with the people (to secure a state legislature that will apportion properly); malapportionment is chronic and embroiled in politics, and courts should avoid this political thicket; the Constitution has many commands that are not enforceable but left to legislative or executive action, and ultimately to the people; the possible consequences of decision were of great magnitude and the judicial processes inadequate for dealing with them; in our system of government it is appropriate that Congress have the final determination whether to seat Congressmen.

[Federal-State Relations]

To abstain or not to abstain in a hard case that seriously affects the balance between the federal government and the states puts a court to the task of assaying values and assessing effects. Here we must weigh the value, in a federal system, of preserving the integrity of a state as a polity, including a state's control over its political subdivisions and the state administrative process—against the value of an individual's right to vote in city elections when as a consequence of a state law gerrymandering municipal limits he does not live in a municipality. We must weigh the effects of federal action against inaction, of judicial intervention against self-limitation. This weighing of values and effects is in no sense a play on the word "political." It is a reasonable basis for a decision that may appear indefensible only when the case is sought to be reduced to the single question: did the plaintiff have a constitutional right of which he was deprived or did he not?

III.

In my judgment, *Colegrove v. Green and South v. Peters* control this case. Even if they were not controlling, I would favor withholding the exercise of our equity powers for the reasons given and for the following reasons.

(1) Grant of relief would put federal courts in the position of interfering with the internal governmental structure of a state, putting a new kind of strain on federal-state relations already severely strained. Control over the political subdivisions of a state including the incorporation of cities and towns and the determination of their boundaries, is a political function of the state legislature and an attribute of state sovereignty in a federal union. So it has always been held. Let the chips fall where they may, the courts have decided. This is the substance of the holdings in *Commissioners of Laramie County v. Com'rs of Albany County*, 1876, 92 U.S. 307, 23 L.Ed. 552; *Town of Mount Pleasant v. Beckwith*, 1879, 100 U.S. 514, 25 L.Ed. 699; and *Hunter v. City of Pittsburgh*, 1907, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151. In these and similar cases the citizens who suffered from changes in city limits, by loss of property values or by increased taxation (if the boundaries are extended) or from lack of fire and police protection (if the boundaries are contracted) and from loss of voting privileges (in the case of a gerry-

mander), were in the same situation as the plaintiffs are in this case.

(2) The plaintiffs ask the Court to hold unconstitutional a law that is clearly constitutional on its face. The statutory approach necessary to reach that somewhat unusual result would compel the Court to go beneath the surface of the law and impute to the legislature an unprofessed subjective intention. This ulterior motive, when coupled with inferences from the effect of the law, would then be fatal to the constitutionality of the statute. As Mr. Justice Cardozo put it, this process spreads psychoanalysis to unaccustomed fields. *United States v. Constantin*, 296 U.S. 287, 299, 56 S.Ct. 223, 80 L.Ed. 233. I recognize that occasionally there may be statutes which are unconstitutional in the light of their effect and the legislature's intentions. Over the long pull, however, I believe that the interests of justice lie in the direction of testing a law in the light of what the law says, not in the light of what the legislature intends. Rather than deviate from that principle in a case involving the exercise of a political function historically lodged with the state and free from federal supervision, I would heed the frequent admonition to avoid a decision upon the constitutional question when there is a tenable alternative ground for disposing of the controversy.

(3) This case differs from all cases involving successful complaints of discrimination under the Fourteenth and Fifteenth Amendments in that there is no effective remedy. An injunction will enable a citizen to vote—if he lives in a voting district where an election is held. It is an empty right when he does not live in a voting district. The best that this Court could do for the plaintiffs would be to declare Act 140 of 1957 invalid. There is nothing to prevent the legislature of Alabama from adopting a new law redefining Tuskegee town limits, perhaps with small changes, or perhaps a series of laws, each of which might also be held unconstitutional, each decision of the court and each act of the legislature progressively increasing the strain on federal-state relations. As stated in *Colegrove*: "No court can affirmatively remap the Illinois districts. * * * At best we could only declare the existing electoral system invalid." Nor can this Court remap Tuskegee. If we had the competency to determine the proper geographical limits for towns in Alabama, still there would be no way of our giving effect to the talents of our judges: the plaintiffs' only real remedy is one we

have no right to give—a mandamus against the legislature of Alabama.

[An Unmanageable Situation]

In short, the situation is unmanageable. If we intervene we shall only intensify the very dispute we are asked to settle. And federal courts have no mission—from the constitution or from that brooding omnipresence of higher law so often an influence on constitutional decisions—to find

a judicial solution for every political problem presented in a complaint that makes a strong appeal to the sympathies of the court. To repeat the words of Chief Justice John Marshall: "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. * * * [But] such an interposition by the court * * * savors too much of the exercise of political power to be within the proper province of the judicial department."

PRIVATE PROPERTY

Owner's Control of Premises—Virginia

Bruce BOYNTON v. COMMONWEALTH of Virginia.

Supreme Court of Appeals of Virginia, June 19, 1959, Refused Case No. 4668.

SUMMARY: A Negro interstate bus passenger refused to leave a terminal restaurant where he had sought refreshment at a regularly scheduled stop in the course of his journey. He was convicted in a Richmond, Virginia, municipal court on a complaint charging "trespass upon the premises at Trailway Bus Terminal, 9th and Broad Streets" and was sentenced to pay a \$10 fine for violating a statute making it unlawful for one to remain "without authority of law" upon premises of another after having been forbidden to do so. The state Supreme Court of Appeals rejected a petition for a writ of error and supersedeas, thereby affirming the lower court judgment.

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 19th day of June, 1959.

The petition of Bruce Boynton for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 20th day of February, 1959, in a prosecution by the Commonwealth against Bruce Boy-

ington, alias Bruce Boynton, for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

PUBLIC ACCOMMODATIONS

Restaurants—New Jersey

Melvin S. EVANS and John R. Norwood v. Burt J. ROSS, Trading as Holly House.

Superior Court of New Jersey, Appellate Division, September 21, 1959, 154 A.2d 441.

SUMMARY: On complaint of an all-Negro group, the New Jersey Department of Education, Division Against Discrimination, found a restaurant proprietor guilty of racial discrimina-

tion in refusing to reserve a dining room for their use. A cease and desist order was entered, and the Camden County Court affirmed. 150 A.2d 512, 4 Race Rel. L. Rep. 355 (1959). On further appeal, the Superior Court, Appellate Division, also affirmed. The court ruled that although the Law Against Discrimination as originally enacted created the Division Against Discrimination only "with power to prevent and eliminate discrimination in employment . . . and to take other actions against discrimination . . . as herein provided," subsequent amendments stating that "all persons" shall have the opportunity without racial discrimination to obtain the use of any place of public accommodation enlarged the Division's specific jurisdiction over employment to include public accommodations also. The court also held that appellant's special dining rooms, in question here, for which it is necessary to make a reservation and to which the public does not have access after such reservation is made, are not private in nature, because public patronage of them is invited; therefore these rooms were covered by the statutory provisions concerning places of public accommodation. The contention that a refusal to serve a group is not covered by the Law was rejected, as "all persons" applies not only to individuals as such but also to groups. It was finally held that the availability of proceedings under the more strictly construed penal Civil Rights Act did not prevent complainants from taking advantage of the "quick and effective" method of the Law Against Discrimination, an act which is not penal but remedial in nature and which must be construed "fairly and justly with due regard to the interests of all parties."

GOLDMANN, S.J.A.D.

Melvin S. Evans and John R. Norwood filed complaints with the Division Against Discrimination, in the State Department of Education, charging Burt J. Ross, trading as Holly House, with violating the Law Against Discrimination (L.1945, c. 169, as amended; N.J.S.A. 18:25-1 et seq.), and specifically N.J.S.A. 18:25-12(f), in that he refused to rent any banquet or meeting room facilities in Holly House to their organization, the Moorestown Civic Club, because it was an all-Negro group. Ross answered and by way of separate defenses alleged, among other things, that (1) although the dining room at Holly House was a place of public accommodation, the banquet and meeting rooms were not, but were private facilities for the use of such specific persons and groups as he might contract with; (2) the Division was without jurisdiction to hear the complaints; and (3) he had not committed any act of unlawful discrimination within the meaning of the statute. Following a full public hearing the Commissioner of Education filed a decision and order in which he found Ross guilty of discrimination, as charged, and ordering him "to cease and desist from discriminating against any and all persons and any and all groups in the rental of banquet and/or meeting facilities or in extending any other service of the Holly House on account of race, creed, color, or national origin." N.J.S.A. 18:25-17.

Ross thereupon appealed to the County Court. N.J.S.A. 18:25-21. The parties stipulated that

the county judge should decide the factual situation upon the transcript taken below. The County Court affirmed the decision of the Commissioner. Ross thereupon appealed to this court. N.J.S.A. 18:25-23.

[Factual Background]

The complainants, representing the Moorestown Civic Club, went to Holly House on April 24, 1958 and inquired of Ross as to the possibility of having a banquet at his establishment on any Saturday in June. They explained that the club was an all-Negro organization. Ross told them there were no Saturdays available. They made like inquiry as to any Saturday in May, and then July and August. In each case Ross gave them the same answer. They told Ross that it appeared he did not care to rent his facilities to their group, and he said, "That's right." These allegations were proven by virtually uncontradicted evidence at the hearing; indeed, Ross admitted he told complainants he did not wish to rent out his banquet rooms to a Negro group. He also admitted there were rooms that would have been available to other applicants. The Holly House reservation book showed that beginning with May 24, 1958 there was at least one room available every Saturday evening for the rest of the summer.

The Commissioner of Education found as a fact that the banquet and meeting room facilities of Holly House are operated as places of public accommodation and that Ross unlawfully re-

fused to rend these facilities to the Moorestown Civic Club on account of its Negro membership. He also rejected the argument that the Division had no jurisdiction. The County Court came to the same conclusions.

[Division's Jurisdiction Challenged]

The first contention on this appeal is that the Division had no jurisdiction to hear the complaints and to enforce those portions of the Law Against Discrimination which deal with public accommodations. The argument made is that under N.J.S.A. 18:25-6 the jurisdiction of the Division to hear complaints is limited to charges of discrimination in employment. Section 6 of the act provides:

"There is created in the State Department of Education a division to be known as 'The Division Against Discrimination' *with power to prevent and eliminate discrimination in employment* against persons because of race, creed, color, national origin or ancestry or because of their liability for service in the armed forces of the United States, by employers, labor organizations, employment agencies or other persons *and to take other actions against discrimination* because of race, creed, color, national origin or ancestry or because of their liability for service in the armed forces of the United States, *as herein provided*; and the division created hereunder is given general jurisdiction and authority for such purposes."
(Italics ours.)

Although recognizing that the Law Against Discrimination has since 1945 been amended in many respects (of which more hereafter), appellant points out that section 6 has not been changed so as to enlarge the original jurisdiction of the Division. Pointing to the above italicized phrase, "as herein provided," he contends that the Legislature thereby specifically limited the jurisdiction of the Division to the specific type of complaint set out in that section—discrimination in employment. The argument is transparently without merit.

[Anti-Discrimination Law Amended]

The Law Against Discrimination, L.1945, c. 169, originally applied only to discrimination in employment. Section 11 (N.J.S.A. 18:25-12), containing subparagraphs (a) through (e), per-

tained to employers, labor organizations and employment agencies, and persons aiding and abetting the doing of any acts forbidden under the law as promulgated. L.1949, c. 11, extensively broadened the provisions of the act. Thus, section 4 (N.J.S.A. 18:25-4) was amended to provide that "All persons shall have the opportunity to obtain employment and obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, without discrimination because of race, creed, color, national origin or ancestry * * *." Section 8 (N.J.S.A. 18:25-8) was amended to empower the Commissioner of Education to organize the Division Against Discrimination into two sections, the first dealing with complaints alleging discrimination in employment and the second with complaints alleging "other unlawful acts of discrimination." The 1949 law also contained a whole series of related amendments making other procedural sections apply to "unlawful discrimination" as well as "unlawful employment practice"—see, for example, sections 8, 9, 10, 11 and 14 of L.1949, c. 11 (now N.J.S.A. 18:25-13, 14, 15, 17 and 21). Finally, section 11 of the original act (now N.J.S.A. 18:25-12) was amended by adding subparagraph (f), making it an unlawful discrimination "for any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof * * *." "Unlawful discrimination" is defined by N.J.S.A. 18:25-5(d) to include those types of discrimination, other than unlawful employment practices, prohibited by N.J.S.A. 18:25-12.

Appellant cites *Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47, 148 A.2d 1 (1959), in support of his argument that the Division was without jurisdiction, noting that the Supreme Court, in commenting on the 1945 act, said that the Division was created with power to eliminate employment discrimination. He fails to observe that the court went on to say that the 1949 amendments "extended the scope of L.1945, c. 169, to include discriminations in places of public accommodation and amusement based on race, creed, color, national origin or ancestry * * *." 29 N.J. at page 59, 148 A.2d at page 7.

The interpretation of the statute contended for by appellant would render the 1949 amendments

futile and abortive. Courts will not so construe a statute if that result can possibly be avoided, particularly where one must strain to arrive at such a construction. In construing an enactment we must give effect to the overriding plan or purpose of the Legislature as fairly expressed in its language. We avoid any interpretation that will render any part of the statute inoperative, superfluous or meaningless. *O'Rourke v. Board of Review*, 24 N.J. 607, 610-611, 133 A.2d 333 (1957).

There was no need to amend section 6 of the 1945 law because it already gave the Division the power to prevent and eliminate discrimination in employment, as well as "to take other actions against discrimination . . . as herein provided." The word "herein" plainly means "in this law." With the passage of the 1949 amendments the Division thereafter was empowered to take action against discrimination in places of public accommodation.

[Place of Public Accommodation]

Appellant's second point is that the Holly House banquet and meeting rooms are not places of public accommodation within the meaning of the act. Holly House consists of a public dining room on one side of the main entrance hall and some five banquet or meeting rooms of varying size on the other, accommodating small and large groups. These rooms are regularly used by many different organizations for parent-teacher association meetings, boy scout meetings, fashion shows, funeral gatherings, union meetings, religious services by Jewish and Catholic organizations, and other purposes. In most cases no service of food is involved. When food is ordered it is served from the same kitchen and by personnel under the same Holly House management. Receipts go into the same account as those from the main dining room. The availability of the rooms is advertised on highway billboards and by brochures. A typical example of billboard advertising is a sign on Route 130: "Dining-out luxury at stay-at-home prices, 9 miles ahead, Ross's Holly House Restaurant, South Jersey's largest restaurant, air conditioned, 6 banquet rooms."

N.J.S.A. 18:25-5(j) defines a place of public accommodation as including "any restaurant, eating house, or place where food is sold for consumption on the premises; . . . any auditorium, meeting place or public hall; . . ." As the

County Court judge remarked, Holly House fits within either or both of these categories.

The banquet or meeting rooms at Holly House are just as much public accommodations within the meaning of the act as its main dining room. The evidence establishes that they are an integral part of the facilities offered by appellant to the public—physically, operationally, financially, and in respect to the general invitation extended. Appellant argues that the rooms can only be rented by private contract, arrived at after he has determined the use to which the desired room will be put, the size of the group involved, when the facility will be used, whether food will be served, and the like. This, he urges, establishes the banquet and meeting facilities as private rooms, rather than public accommodations. Under the facts of this case, as well as the statute, we perceive no adequate basis for such a distinction.

[Legislative Intent Considered]

In construing the Law Against Discrimination courts must give prime consideration to the object of the Legislature and the evil it sought to remedy. *New Capitol Bar & Grill Corp. v. Div. of Employment Sec.*, 25 N.J. 155, 160, 135 A.2d 465 (1957). As the Attorney General observes, the situation or condition with which the Legislature intended to deal in enacting the 1949 public accommodation amendments was essentially and obviously this: that an establishment which caters to the public, and by advertising and other forms of invitation induces patronage generally, cannot refuse to deal with members of the public who have accepted the invitation, because of their race, creed, color, national origin or ancestry. The law is designed to insure that all citizens of this State shall have equal rights as members of the public and not be subjected to the embarrassment and humiliation of being invited to an establishment, only to find its doors barred to them. Once a proprietor extends his invitation to the public he must treat all members of the public alike. The present case is just such a one as the law was expressly designed to cover.

Appellant cites cases arising under the civil rights statutes of other states, admittedly penal in nature or strictly construed. Our act, however, is not penal but remedial in nature, and by its very terms must be construed "fairly and justly with due regard to the interests of all

parties" so as to accomplish its salutary purpose. N.J.S.A. 18:25-27. Accordingly, we find the out-of-state citations unpersuasive.

The Holly House banquet or meeting rooms are "private"—to use appellant's word—only in the sense that they can be hired for the exclusive use of a particular group or organization. They are still public accommodations, just as any private hotel room or private hospital room would be within the meaning of the law. See N.J.S.A. 18:25-5(j).

Finally, appellant claims that he did not commit an act of discrimination. He points to the fact that Negroes have been served in the public dining room of Holly House, and have attended meetings of organizations renting banquet or meeting rooms. His only objection is against an all-Negro group, and he urges that this is not the type of practice prohibited by the statute.

As we have already noted, not only were appellant's discriminatory acts proven without contradiction, but he himself admitted at the hearing that he told complainants he did not wish to make the facilities available to Negroes. This evidence was coupled with proof that he had falsely stated to them that he had no rooms available for the times requested by them.

[Discrimination Held Established]

We find that discrimination was established beyond any reasonable doubt. As the Commis-

sioner rightly observed, the act makes no distinction between individuals who come as individuals and those who come in groups, nor as to whether they are all of one race. The civil right which every person has to obtain the advantages and facilities of any place of public accommodation is conferred upon "all persons" by N.J.S.A. 18:25-4.

At the oral argument, as in his brief, appellant urged that there is an available remedy under the Civil Rights Act, N.J.S.A. 10:1-1 et seq., which provides that any person violating any provision of the act shall be subject to a penalty of not less than \$100 nor more than \$500 to be recovered in a civil action, with costs, for each and every violation, and shall also for every such violation be deemed guilty of a misdemeanor, and upon conviction thereof be subject to a fine of not more than \$500 or imprisonment for not more than 90 days, or both. The 1949 amendments to the Law Against Discrimination were intended to combine into one law the substantive provisions of the Civil Rights Act and the existing Law Against Discrimination (1945). See the statement appended to Assembly Bill 65 (1949). The Law Against Discrimination provides a quick and effective method for suppressing discrimination, and the complainants are entitled to its protection. They may not be relegated to the more strictly construed provisions of the penal Civil Rights Act.

Affirmed.

RELIGIOUS FREEDOM, DUE PROCESS, EQUAL PROTECTION Sunday Laws—Massachusetts

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., Corporate Plaintiff, and Irving Heafitz, Morris Chaitovsky and Ruth B. Cohen, suing on behalf of themselves and other similarly situated and Rabbi Moses D. Sheinkopf, Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and President of the Massachusetts Council of Rabbis, suing on behalf of himself and other Rabbis similarly situated v. **Raymond P. GALLAGHER,** Chief of Police of the City of Springfield, Massachusetts.

United States District Court, District of Massachusetts, May 18, 1959, 176 F.Supp. 466.

SUMMARY: The manager of a corporately-owned food supermarket in Springfield, Massachusetts, predominantly stocking kosher items and serving Jewish customers, was convicted in a state court of violating "Lord's day law" prohibitions against keeping business places

open and doing labor on Sunday. Attacks on the validity of the law under the state constitution were overruled by the state Supreme Judicial Court. *Commonwealth v. Chernock*, 336 Mass. 384, 145 N.E.2d 920 (1957). The corporate owner, three named customers (Orthodox Jews) for themselves and others similarly situated, and a Jewish rabbi for himself and others similarly situated then filed a complaint in federal district court for a declaration of the invalidity of the law, as applied to them, under the federal constitution and for injunctions against enforcement thereof by the defendant local police chief. Counsel for the state appeared to oppose the relief prayed. Preliminarily, the three-judge court stated that when, as here, the plaintiffs have no means of obtaining relief at law, and when state officials propose to enforce a state criminal statute which denies a citizen's civil rights until its unconstitutionality is finally adjudicated, a federal court may not decline as a matter of equitable discretion to take jurisdiction of a suit to enjoin its operation. The court then held that the law violates freedom of religion provisions of the First Amendment as incorporated into the Fourteenth Amendment, because it furnishes special protection to dominant Christian sects observing Sunday as the Lord's day without furnishing such protection in their religious observances to those Christian sects and Jews observing Saturday as the Sabbath. It was found that the latter are thereby penalized economically through deprivation of the productive use of one more day of the week than the former; convenience-wise in losing the advantage of a week-end, off-day shopping; and religiously in being hindered in efforts to continue due observance of the seventh day Sabbath and, in the case of Jews, supervision of dietary laws. The court refused to regard the law as merely a "day-of-rest" statute enacted pursuant to the police power, but pointed both to legislative history and internal provisions as indicating clearly a religious motivation. It was also held that the law, in arbitrarily requiring the supermarket to close on Sunday absent any legitimate interest which the state was entitled to safeguard and in thereby causing the corporate plaintiffs to lose potential sales and the use of its property, deprived it of liberty and property, and the other plaintiffs of liberty, without due process of law, and that discriminations apparent on the statute's face constituted a denial of equal protection of the laws, all in violation of the Fourteenth Amendment. On rehearing, a motion by the state attorney general for a new trial was denied. One judge dissented.

Before MAGRUDER and WOODBURY, Circuit Judges, and McCARTHY, District Judge.

MAGRUDER, Circuit Judge.

It is always an unpleasant task for a lower federal court to sit in review upon the constitutionality of state legislation, but sometimes a three-judge district court can find no escape from doing that, under 28 U.S.C. §§ 1331, 1343, 2281 and 2284. We believe the present to be such a case.

The attack which we have to consider is upon the validity, under the Federal Constitution, of the modern version of what started as one of the famous "blue laws" enacted by the Great and General Court of Massachusetts in colonial days. Specifically, we refer to the so-called "Lord's day" statute, still on the books in Massachusetts. M.G.L.A. c. 136 § 1 et seq. So far as we are aware, the Supreme Judicial Court has had no occasion to pass on the validity of this statute under the Federal Constitution, though that court has, rather gingerly and brief-

ly, upheld the statute against attacks based upon the state Constitution. See *Commonwealth v. Has*, 1877, 122 Mass. 40; *Commonwealth v. Chernock*, 1957, 336 Mass. 384, 145 N.E.2d 920.

[Relief Sought]

The federal complaint now before us seeks a declaration that certain provisions of the "Lord's day" statute of Massachusetts are unconstitutional, as applied to the plaintiffs. Preliminary and final injunctions restraining the defendant, the Chief of Police of the City of Springfield, from enforcing against the plaintiffs the criminal provisions of the law were asked for. A three-judge court was designated to hear the suit, pursuant to the provisions of 28 U.S.C. §§ 2281 and 2284. The motion for a preliminary injunction was not pressed, after the parties had informally agreed that the plaintiffs would not be prosecuted until after decision of this case. The defendant filed a motion to dismiss, which was

consolidated with the hearing on the merits before this court.

Counsel for the Commonwealth has appeared to oppose the relief prayed, and by leave of court consolidated briefs were filed on behalf of two pairs of amici curiae, The Lord's Day League of New England and the Archdiocesan Council of Catholic Men, arguing that the statute should be upheld, and the International Religious Liberty Association, together with the Southern New England Conference of Seventh Day Adventists, urging that the statute is unconstitutional.

Joined as plaintiffs were Crown Kosher Super Market of Mass., Inc., a corporation operating a kosher supermarket in Springfield, Massachusetts, three named customers thereof, suing on behalf of themselves and others similarly situated, and a rabbi suing on behalf of himself and other rabbis similarly situated.

[Factual Summary]

Most of the facts were stipulated by the parties, but some additional oral and documentary evidence was presented by the plaintiffs at the hearing before us.

The corporate plaintiff's supermarket (hereinafter called the Crown Market) offers for sale all categories of food ("one stop shopping"); all of its meats and meat products are kosher, and something like 95 per cent of the rest of its stock is kosher. The Crown Market is the only store of this kind in the area of Springfield; apparently it is the only one within 26 miles or more.¹ But Springfield has several kosher butcher shops and some delicatessen shops and supermarkets which sell certain kosher products.

The four officers and stockholders and the

1. The testimony that the nearest similar store was in Hartford, Connecticut (about 26 miles to the south), was not rebutted, and is corroborated by the fact that the list of customers attached to the complaint contains names of persons coming from the following towns in addition to Springfield (approximate distance and direction from Springfield are noted parenthetically):

Brattleboro, Vt. (60 mi. N)
Pittsfield, Mass. (53 mi. WNW)
Athol, Mass. (50 mi. NE)
Turners Falls, Mass. (43 mi. NNE)
Greenfield, Mass. (39 mi. N)
Ware, Mass. (25 mi. ENE)
Holyoke, Mass. (12 mi. NNE)
Westfield, Mass. (9 mi. W)
Eufield, Conn. (9 mi. S)
Agawam, Mass. (4 mi. SSW)
Longmeadow, Mass. (3 mi. S)
W. Springfield, Mass. (3 mi. W)

six directors of the corporate plaintiff are all adherents of the Orthodox Jewish faith, who duly observe the Jewish Sabbath, from sundown Friday to sundown Saturday. A very substantial percentage of the corporate plaintiff's customers are Orthodox Jews, and most of the others are Conservative Jews who observe the Jewish Sabbath.

The due observance of the Jewish Sabbath requires total abstinence from business and work of even the most trivial sort. Any riding in automobiles or other conveyances and walking extraordinary distances are forbidden. With particular reference to this case, the religious belief of the officers, directors and stockholders of the corporate plaintiff completely precludes the operation of the store on the Jewish Sabbath, since that would be doing business vicariously and causing others to work on the Sabbath. The large majority of Crown Market's customers, who share these beliefs, may not shop on the Sabbath, nor may they cook. Preparation for meals during the 24 hours of the Jewish Sabbath, and especially for the traditional family feast on Friday night, consumes most of the daylight hours on Friday.

[Saturday Closing]

It follows that the Crown Market (like other kosher stores) is not open for business between sundown Friday and sundown Saturday, and on thirteen Jewish holidays each year. Even if the store were open on Saturday, the great majority of its patrons could not take advantage of it, just as they cannot take advantage of the other stores which are open Friday night and Saturday and sell some kosher food. Business considerations make operation on Saturday night impracticable. If, after sundown, the store were prepared for business (for instance, by cutting meat) and were then opened, few hours would remain before a suitable closing time; the twelve store employees (six of whom are butchers) would demand extra wages for their trouble, and most customers would find it inconvenient, if not impossible, to shop during those night hours, especially those who would have to travel significant distances starting after sundown.

But it is common knowledge that the normal pattern of a grocery store's business shows a gradual increase in volume, from very little business on Monday to somewhat more during the day on Friday. The stores are jammed and a

vast amount of business is done on Friday evening and Saturday. Since the Orthodox and Sabbath-observing Conservative Jews, such as the customers of the corporate plaintiff, cannot shop on Friday night or Saturday, and they have spent the Sabbath as a day of rest or religious celebration and family communion. Sunday is the only day which has for them the advantages as a shopping day that Saturday has for the majority of the people.

Under these circumstances, it is not surprising that more than one-third of Crown Market's gross sales each week are made on Sunday. It would not be practicable for Crown Market to sell only kosher meat from 6 A.M. to 10 A.M. on Sunday, as permitted by law, for economic reasons similar to those preventing operations on Saturday night after sundown. The few sales would not justify the great expense.

[Statute Violated]

The Crown Market is open for business from 8 A.M. to 6 P.M. every Sunday, and has been open every Sunday (excluding Jewish holidays) since it was established August 18, 1953. It thus has been and is violating the statute, the constitutionality of which is being attacked in this proceeding. The manager of the Crown Market (who is also the corporate plaintiff's president and owns 50 per cent of the stock thereof) was convicted of violation of the challenged provisions of the Lord's day law in the Massachusetts state court. His exceptions in that trial, which questioned the constitutionality of the law under the state constitution but raised no federal constitutional issue, were overruled by the Supreme Judicial Court. *Commonwealth v. Chernock*, supra, 1957, 336 Mass. 384, 145 N.E.2d 920. Even if the defendant had pleaded *res judicata* (which he has not, see Rule 8 (c), F.R. Civ.P., 28 U.S.C.A.), it seems obvious enough that the corporate plaintiff is not bound by *Commonwealth v. Chernock*, nor is any of the individual plaintiffs.

The defendant threatens to enforce the law to the full extent of his authority. Thus it must be taken that he will institute repeated criminal prosecutions against the corporate plaintiff, its four officers and stockholders, and its six directors and twelve employees, for each violation, that is, for each Sunday on which Crown Market is open for business.

[Classes Adequately Represented]

Two of the three named customer-plaintiffs are residents of Springfield and the third is a resident of Turners Falls, 43 miles to the north. All are Orthodox Jews who are regular customers of the corporate plaintiff's store. These three customers adequately represent a class of Orthodox Jewish people of the area served by the corporate plaintiff's store; they seek to enforce, by obtaining a common relief, their several rights which depend, however, on common questions of law and fact within the meaning of Rule 23(a)(3), F.R.C.P.

The named plaintiff-rabbi is the Chief Orthodox Rabbi of The United Orthodox Congregations of Springfield and is the president of the Massachusetts Council of Rabbis. He has been duly authorized by the latter organization to represent it in the prosecution of this action. Besides his religious duties as leader and teacher of his congregation, this rabbi has the duty (which he may and in fact does discharge through an inspector appointed by him) of inspecting kosher markets and butcher shops daily except on the Jewish Sabbath to ensure compliance with Jewish dietary laws. The inspector comes to the Crown Market at 8 A.M. on Sunday for the washing of any meat from animals slaughtered on the previous Thursday which is on hand. Among the dietary rules enforced is that fresh meat must be rewashed every 72 hours, that only meats and seafood of certain kinds and quality may be eaten, and that meat and dairy products must not be commingled, even by the use of the same implements for both. We think that the plaintiff-rabbi adequately represents a class, and that this class seeks to enforce by a common relief certain common rights and certain several rights which depend upon common questions of law and fact within the meaning of Rule 23 (a)(1) and (3), F.R.C.P.

[Enjoining Criminal Statute Operation]

Preliminarily the defendant relies upon a point of equity jurisdiction based upon the justifiable reluctance of federal courts of equity to interfere by way of injunction with the operation of a state criminal statute. As stated in *Spielman Motor Sales Co., Inc. v. Dodge*, 1935, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322, "there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional

rights." In *Douglas v. City of Jeannette*, 1943, 319 U.S. 157, 63 S.Ct. 877, 880, 87 L.Ed. 1324, in which similar language occurs, the actual decision was that the bill should be dismissed for "want of equity", since an injunction against enforcement of the ordinance was unnecessary because, in parallel litigation, the Supreme Court had already adjudicated that the ordinance was unconstitutional. *Murdock v. Commonwealth of Pennsylvania*, 1943, 319 U.S. 105, 63 S.Ct. 891, 87 L.Ed. 1292.

It would be nice if we could say to these plaintiffs, "Go ahead and violate the challenged statute, and urge your defense based upon federal constitutional grounds in the course of the state court proceeding." But the matter is not so simple as that. It seems clear, from the recent decision in *Evers v. Dwyer*, 1958, 358 U.S. 202, 79 S.Ct. 178, 3 L.Ed.2d 222, that when enforcement of a state criminal statute results in the denial of civil rights of a citizen and the state officials intend to enforce the statute unless and until its unconstitutionality has been finally adjudicated, a three-judge district court may not decline as a matter of discretion to take jurisdiction of a suit to enjoin the operation of the statute. Furthermore, this argument by the defendant really relates only to the corporate plaintiff. Because there is an exception in the statute that permits persons situated as are the plaintiff-customers and the plaintiff-rabbis to perform "secular business and labor" on Sunday, these particular individual plaintiffs cannot, either by shopping at the corporate plaintiffs store or by inspecting it, or by any other act in the capacities in which they appear here, violate, the Sunday law. It is evident that for them the *only* method by which they can vindicate the constitutional rights claimed is by obtaining equitable relief.

[Unconstitutionality Alleged]

As stated in the complaint, the grounds for challenging the Sunday law are all founded upon the Fourteenth Amendment. Simply stated, these are: (1) That the Lord's day law is a law respecting the establishment of religion and denying the free exercise of religion and hence is violative of the due process clause of the Fourteenth Amendment. See *Douglas v. City of Jeannette*, supra, 319 U.S. at page 162, 63 S.Ct. at page 880; (2) that the statute deprives the corporate plaintiff of its property and the other

plaintiffs of their liberty arbitrarily and therefore is a denial of due process of law guaranteed by the Fourteenth Amendment; and (3) that the statute denies the corporate plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment. It can hardly be disputed that the corporate plaintiff has standing to assert the grounds numbered 2 and 3 supra, and that the individual plaintiffs have standing to assert the grounds numbered 1 and 2 supra. If we were required to go into the matter, which we are not now, we would be prepared to hold that the facts of this case bring it squarely within the exception to the Supreme Court's "rule of practice" forbidding one party to assert somebody else's constitutional rights, so that all plaintiffs could argue all grounds. See *Pierce v. Society of Sisters*, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; *Pearl Assurance Co., Limited, of London, England v. Harrington, D.C.* Mass. 1941, 38 F.Supp. 411, affirmed 1941, 313 U.S. 549, 61 S.Ct. 1120, 85 L.Ed. 1514; *Bartels v. State of Iowa*, 1923, 262 U.S. 404, 410-411, 43 S.Ct. 628, 67 L.Ed. 1047; *Barrows v. Jackson*, 1953, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586.

[Sunday Law History]

It is clear that the first Sunday law, enacted in 1653, and the various modified versions thereof also enacted in the colonial period, had the religious purpose to compel a seemingly observance of that day of the week celebrated as the Sabbath (Sunday) by the dominant Christian sect. See Colonial Laws of Mass. 132-33, 134; Mass. Bay Province Acts 1692-93, c. 22; 1716-17, c. 13; 1727-28, c. 5; 1760-61, c. 20. See also the codification of 1782, passed by the legislature assembled under the Constitution of the Commonwealth of Massachusetts. Mass. Acts 1782, c. 23. These enactments were prior to the adoption of the Constitution of the United States and long before the adoption of the Fourteenth Amendment.

In enactments subsequent to the creation of the Federal Union, the Massachusetts legislature began to eliminate some provisions from the earlier prohibitory clauses of its Sunday laws. See Mass. Acts 1791, c. 58; R.S. 1836, c. 50.

In 1858 the legislature, apparently yielding to various pressure groups, commenced the practice of writing in various exceptions to the general prohibition against secular activities on the

Lord's day, which has resulted in amendments by some seventy-odd different enactments.²

[An "Unbelievable Hodgepodge"]

The result of all this is that the Sunday law, as it now exists on the books, is an almost unbelievable hodgepodge. Chapter 136 of the Massachusetts General Laws, entitled "Observance of the Lord's day", contains in § 5 the general prohibition which defendant is threatening to apply to the plaintiffs: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars." (There is no doubt that the "Lord's day" as used in the statute means Sunday.) Then § 6 and the succeeding sections contain miscellaneous exceptions and qualifications, none of which do these plaintiffs any good. One of such exceptions might have seemed as an original matter to be applicable to the corporate plaintiff. It is provided in one part of § 6: "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby". But the Supreme Judicial Court has held, and of course that court's interpretation of the state statute is binding upon us, that this particular exception does not excuse the separate offense of keeping one's shop open on the Lord's day, although the defendant in conscience believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business on that day. *Commonwealth v. Has*, supra, 122 Mass. 40. To the same effect see *Commonwealth v. Kirshen*, 1907,

194 Mass. 151, 80 N.E. 2; *Commonwealth v. Starr*, 1887, 144 Mass. 359, 11 N.E. 533.

[Has Case Relied Upon]

Much is made by the defendant of the following extract from the opinion of the Supreme Judicial Court in *Commonwealth v. Has*, supra, 122 Mass. at page 42:

"This act has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community."

[*"Day of Rest" Characterization*]

This description of the Massachusetts Sunday law as being merely a "day-of-rest" statute, enacted pursuant to the police power, is answered by an examination of the statute, particularly those numerous provisions which permit various activities on Sunday, which certainly are not "works of necessity and charity", as specified hours and places designed not to affront godly persons worshipping in their churches during

2. Mass. Acts 1858, c. 151; 1881, c. 119; 1886, c. 82; 1887, c. 391; 1893, c. 41; 1895, c. 434; 1897, c. 389; 1900, c. 440; 1901, c. 80; 1902, c. 414; 1904, c. 460; 1906, c. 139; 1908, cc. 123, 126, 273, 333, 343, 354, 385, 537; 1909, cc. 420, 423; 1910, c. 327; 1911, c. 328; 1914, c. 757; 1916, c. 146; 1917, c. 207; 1918, c. 257; 1920, cc. 141, 240; 1922, c. 119; 1928, cc. 234, 406; 1929, c. 118; 1930, cc. 90, 143, 179; 1931, cc. 41, 71, 174, 176, 240, 275, 426; 1932, cc. 96, 105; 1933, cc. 150, 309; 1934, cc. 55, 63, 354; 1935, cc. 78, 104, 169; 1936, c. 129; 1937, c. 286; 1938, cc. 60, 143; 1943, c. 473; 1945, c. 575; 1946, cc. 207, 318; 1948, c. 119; 1949, c. 190; 1950, cc. 256, 322, 681; 1951, cc. 32, 504; 1954, cc. 132, 217; 1955, cc. 255, 304, 524, 742; 1956, cc. 11, 157, 212, 256.

the usual morning hours. Moreover, the exceptions, permitting a great variety of functions on Sunday, are not by § 6 made conditional upon the observance of some other day in the week as a day of rest. In fact there is on the statute books a wholly separate requirement, Mass. G.L. c. 149, § 48, imposing upon employers of labor the obligation to see to it that their employees are allowed "at least twenty-four consecutive hours of rest, which shall include an unbroken period comprising the hours between eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days." The characterization of the Sunday law as being merely a civil regulation providing for a "day of rest" seems to have been an *ad hoc* improvisation in *Commonwealth v. Has*, supra, because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state Constitution if the religious motivation of the statute were more explicitly avowed. At any rate, that characterization of the statute is contradicted by other pronouncements of the Supreme Judicial Court both before and after the date of the decision in *Commonwealth v. Has*. See, for instance, *Pearce v. Atwood*, 1816, 13 Mass. 324, 345-346; *Bennett v. Brooks*, 1864, 91 Mass. 118, 121; *Davis v. City of Somerville*, 1880, 128 Mass. 594, 596; *Commonwealth v. White*, 1906, 190 Mass. 578, 580-581, 77 N.E. 636, 637, 5 L.R.A., N.S., 320. In the last-named case, blissfully ignoring what was said in *Commonwealth v. Has*, the Supreme Judicial Court said:

"In construing this statute it is to be borne in mind that, so far as material to the question before us, it is simply the continuation of a law which, from a very early time in the history of the colony, has been constantly upon our statute books. It is one of a series of statutory provisions enacted to secure the proper observance of the Lord's day, as understood by our forefathers. Their idea of the Lord's day, the manner in which it should be spent, and the object of the system of statutes passed from time to time to secure its proper observance, are set forth in the various preambles to those statutes. One of these is in the following language: 'Whereas it is the duty of all persons, upon the Lord's day, carefully to apply themselves, publicly and privately to religion and piety, the prophanation of the Lord's day is highly offensive to Almighty

God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons, therefore,' etc. See Prov. St. 1760-61, c. 20, § 1; 4 Prov. Laws, (State ed.) 415. Perhaps the most instructive preamble is that which precedes St. 1791, p. 351, c. 58, which was the first general statute passed on this subject after the adoption of our State Constitution. It reads as follows: 'Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct, for public and private worship of the Maker, Governor and Judge of the world and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage as members of a Christian society; to the great disturbance of well disposed persons, and to the great damage of the community, by producing dissipation of manners and immoralities of life: Be it therefore enacted,' etc. Such was the idea of the Lord's day for the observance of which this system was devised."

[True Purpose Revealed]

In fact, the joint brief filed by The Lord's Day League of New England and the Archdiocesan Council of Catholic Men "lets the cat out of the bag", so to speak, in the following statement: "Each organization has various aims and purposes, but have, in common, the purpose of preventing the further secularization and commercialization of the Lord's Day."

Fortunately, in passing upon the constitutionality of the state statute, we do not have to accept the characterization of it made in *Commonwealth v. Has*, supra. See *Society for Savings in City of Cleveland, Ohio v. Bowers*, 1955, 349 U.S. 143, 151, 75 S.Ct. 607, 99 L.Ed. 950.

It seems to us that all the objections which have been taken under the Fourteenth Amendment to the constitutionality of the statute in question are well taken.

As to the freedom of religion provisions of

the First Amendment which the Supreme Court has explicitly told us have been incorporated into the due process clause of the Fourteenth Amendment and have thus become binding on the states, see *Thornhill v. State of Alabama*, 1940, 310 U.S. 88, 95, 60 S.Ct. 736, 84 L.Ed. 1093; *Douglas v. City of Jeannette*, supra, 1943, 319 U.S. 157, 162, 63 S.Ct. 877, 87 L.Ed. 1324; *Thomas v. Collins*, 1945, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430.

We may start with the classic statement from *Everson v. Board of Education*, 1947, 330 U.S. 1, 15-16, 67 S.Ct. 504, 511, 91 L.Ed. 711:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds v. United States*, 1878, 98 U.S. [145] at page 164, 25 L.Ed. 244."

To the above may be added the statement by the Court in the *Everson* case, 330 U.S. at page 18, 67 S.Ct. at page 513:

"State power is no more to be used so as to handicap religions, than it is to favor them."

[Christian Sects Favored]

What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious observances, to those Christian

sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group. It is clear that by denying to the plaintiffs the liberty to work, shop, or pursue other "secular" conduct on Sunday, the law puts an economic penalty upon a person observing as his Sabbath some other day than Sunday by depriving him of the productive use of one further day of the week. In other words, whereas ordinary grocery stores are open six days a week, if the challenged law is constitutional the Crown Market can be open only five days, and none of these five days would include a day of the week end, when a large percentage of the week's sales is normally obtained. Even assuming that the Crown Market could stay in business on such a basis, it could do so only under great handicap as against other supermarkets. Crown Market's Orthodox customers also lose much of the value of their Sunday under the same penalty, since if the law is constitutional they may not shop on either Saturday or Sunday. Without doubt if they remain faithful to their religious convictions, they will be under a very substantial disadvantage as compared with shoppers whose Sabbath is observed on Sunday. The rabbi-plaintiffs would be hindered in their function of supervising the food to be eaten by the members of their congregations, and they would also suffer great detriment in their efforts to preserve, in these circumstances, due observance of the Jewish Sabbath and of the dietary laws by them.

[Due Process Clause Violated]

For reasons closely related to those just set forth, the objection is well taken that, in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires Crown Market to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plaintiffs of liberty, without due process of law, contrary to the Fourteenth Amendment.

We think in addition that, on the decided cases, the discriminations apparent on the face of the statute constitute a denial of the equal protection of the laws, forbidden as well by the Fourteenth Amendment. See *Smith v. Cahoon*, 1931, 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264; *City of Springfield v. Smith*, 1929, 322 Mo. 1129,

19 S.W.2d 1; *Allen v. City of Colorado Springs*, 1938, 101 Colo. 498, 75 P.2d 141; *City of Mt. Vernon v. Julian*, 1938, 369 Ill. 447, 17 N.E.2d 52, 119 A.L.R. 747; *Ex parte Hodges*, 1938, 65 Okl.Cr. 69, 83 P.2d 201; *Arrigo v. City of Lincoln*, 1951, 154 Neb. 537, 48 N.W. 2d 643; *Henderson v. Antonacci*, Fla. 1952, 62 So.2d 5.

Without elaborating the many discriminatory exceptions, two vices may be noted as examples: The statute does not generically forbid the keeping open of a store on Sunday to sell food, but it just limits this liberty to selected types of stores.³ Employees of the favored stores are not less in need of rest than those of the Crown Market, nor does any reason appear why the operation of those stores is less calculated to disturb the rest of citizens than do the operations of the Crown Market. And many classes of work which are excepted are surely no less destructive of public rest and relaxation than the opening of the Crown Market would be.⁴

3. (1) Bakers and their employees may sell during specified hours any food customarily sold by them, and milk as well. (2) Persons who raise fruits and vegetables and their agents may sell the same and milk also on any property they own, during all hours on Sunday. (3) Licensed innholders and licensed common victualers may sell frozen desserts, frozen dessert mix, confectionery, soda water, milk and tobacco, on Sunday, and during certain hours may sell bread. (4) Persons who sell fruit, frozen desserts, frozen dessert mix, confectionery and soda water "on secular days" and are especially licensed may sell the same and milk all day Sunday, and during certain hours may sell bread. (5) Druggists may sell confectionery, soda water, frozen desserts, frozen dessert mix, milk and tobacco during all hours on Sunday. (6) News dealers whose stores are open every other day of the week (thus excluding Sabbath-observing Jews) may sell milk and tobacco at all times on Sunday. (7) Shops operated and staffed by persons who because of conscientious beliefs duly observe Saturday as the Sabbath may sell kosher meat and milk only until 10 A.M.
4. For instance, the persons operating the Crown Market (or the plaintiff customers) could dig ditches, or do any other type of labor, if that were their ordinary calling, and apparently could even vend food outside the store building. Moving such business indoors cannot reasonably be thought to make it more disruptive of a day of rest and recreation.

Other provisions are equally whimsical: When Rosh Hashonoh or Yom Kippur begins at sundown Sunday, fish, fruit and vegetables may be sold until 12 noon; but kosher meat may only be sold until 10 A.M. One may dig for clams on Sunday, but may not dredge for oysters. All professional sports are permitted (under certain conditions) from 1:30 to 6:30 P.M., and hockey, basketball and baseball may run much longer; but amateur sports are tolerated (under the same conditions) only between 2 and 6 P.M. Bowling alleys at amusement parks may open until 12 midnight, whereas other bowling alleys must close at 11 P.M.

[Two Supreme Court Cases]

We ought to comment briefly on two Supreme Court cases much relied upon by the defendant.⁵ In *Hennington v. State of Georgia*, 1896, 163 U.S. 299, 16 S.Ct. 1086, 41 L.Ed. 166, the only claim considered by the Court was that, under the commerce clause, a state could not prohibit the running of a railroad train in interstate commerce on Sunday. The Court held simply that congressional silence could not foreclose the field to state regulation. The opinion assumed that the statute was for the purpose of securing a day of rest, as the Georgia Supreme Court had held, and reasoned from this premise (163 U.S. at page 307, 16 S.Ct. at page 1089). Also, it may be pointed out that this is a pretty old case, which was decided before the modern development of limitations upon the powers of the states implicit in the Fourteenth Amendment. In *Petit v. State of Minnesota*, 1900, 177 U.S. 164, 20 S.Ct. 666, 667, 44 L.Ed. 716, the Supreme Court did affirm a conviction under a Minnesota statute, M.S.A. §§ 614.29, 614.30, prohibiting all labor on Sunday "excepting the works of necessity or charity." The statute contained the provision that keeping open a barber shop on Sunday "shall not be deemed a work of necessity or charity." The Court sustained the conviction of the defendant barber on alternate grounds: (1) That "necessity or charity" did not as a matter of fact include barber shops, so that the proviso really added nothing, and (2) even if barber shops might otherwise be excused from closing, it could not be said that the classification in the circumstances was unreasonable, since courts will take judicial notice of the fact that, in view of the

5. In another case, *Friedman v. People of State of New York*, 1951, 341 U.S. 907, 71 S.Ct. 623, 95 L.Ed. 1345, the United States Supreme Court without opinion dismissed, for lack of a substantial federal question, an appeal from a decision by the New York Court of Appeals upholding a "Sunday law" of that state upon the ground that the statute simply provided in reasonable terms for a day of rest. *People v. Friedman*, 1950, 302 N.Y. 75, 96 N.E.2d 184. That case is clearly distinguishable from the one at bar; the statutes attacked are quite different. The New York law has few characteristics or roots in history tending to indicate that it is a religious regulation; and the New York courts have consistently interpreted it as a civil regulation, whereas the Massachusetts statute has most often been construed as a religious law. Nor does the New York statute contain such prolix and irrational exceptions to its prohibitions as those which dominate the Massachusetts statute before us. Perhaps this is why counsel supporting the statute in the present case have placed such slight reliance on the *Friedman* case.

custom of keeping barber shops open in the evening as well as in the day, the employees in them work more, and during later hours, than those engaged in most other occupations.

This opinion shall constitute the findings of fact and conclusions of law in accordance with Rule 52(a), F.R.C.P.

The form of our decree pursuant to the foregoing opinion will be settled by counsel upon due notice.

McCARTHY, J., dissents from the opinion and judgment of the Court, and will file a dissenting memorandum at a later date.

[*Dissenting Opinion Omitted*]

ON PETITION FOR REHEARING

PER CURIAM.

We have before us a paper wherein the Attorney General for the Commonwealth of Massachusetts comes "and moves that a new trial be granted in the above entitled matter". This may seem somewhat curious because, although an appearance was filed on behalf of the Governor and the Attorney General, the Attorney General has not appeared for the sole defendant, nor does he purport to act for him. We must assume, however, that in effect the Commonwealth intervened as a party defendant pursuant to its undoubted right to do so under 28 U.S.C. § 2284(2), and that the failure to file a formal petition for intervention was just an administrative omission. Thus we take it in the present movant's favor that he has standing to seek a new trial.

[*Sufficiency of Evidence*]

Ground 1 of the motion for a new trial is that: "The evidence submitted is insufficient as a matter of law to sustain findings of fact." Ground 2 reads: "The findings of fact made by the Court are inconsistent with such evidence as was submitted." These grounds are of course important if true. But it must be remembered that in an equity case the court is the trier of the facts. It is the court which must weigh the testimony and other evidence, observe the demeanor of the witnesses, and find the facts. It is abundantly clear that there is evidence to support the findings of fact, and the majority of the court are content to abide by those findings on the evidence submitted.

Ground No. 3 complains of the court's finding that most of the facts were stipulated by the parties, whereas the stipulation actually was limited to the tenets of the Orthodox Jewish faith and did not relate to particular facts affecting the petitioners. This asserted ground for a new trial is patently absurd, in the face of an examination of the stipulations of fact signed by the movant's attorney, especially the supplementary stipulation.

[*"Tempest in a Teapot"*]

Ground No. 7, in which it is stated that the "evidence clearly shows that the meat was not washed on Sunday", is based upon a clear misstatement of the court's finding that "The inspector comes * * * on Sunday for the washing of *any* meat from animals slaughtered on the previous Thursday *which is on hand*." [Italics added.] In any event, this is a tempest in a teapot concerning a very minor matter.

The findings attacked by grounds numbered 4, 5, 6 and 8 are supported by substantial credible testimony, by the stipulations of fact, and by the exhibits, just as is the finding that 95 per cent of Crown Market's stock is kosher.

Ground No. 9 objects to the statement in the court's opinion that the plaintiff customers and plaintiff rabbis cannot, by any act of shopping at the corporate plaintiff's store or by inspecting it, violate the Sunday law. It was stipulated that the plaintiff customers were Orthodox Jews; the rabbis, needless to say, are orthodox. These persons are squarely exempted from the Sunday law by c. 136, § 6, even as construed in *Commonwealth v. Starr*, 1887, 144 Mass. 359, 11 N.E. 533.

Ground No. 10 objects that the judgment is invalid because the majority opinion interpreted the Massachusetts Sunday law in a manner contrary to the interpretation placed upon it by the state courts. The court was bound to accept as its premise the interpretations put upon the Sunday law by the Supreme Judicial Court, and it did so. In fact, at the oral argument before us we understood movant to contend that all the plaintiffs were within the exception contained in § 6; but the court was obliged to accept the contrary holding of the *Starr* case, *supra*. The majority did reject, which it had the right to do, the characterization of the statute in *Commonwealth v. Has*, 1877, 122 Mass. 40 as being merely a police measure designed to preserve a day of rest. We rejected that characterization

as sporadic in the state decisions and unsound on the face of the statute. It is also to be noted that the Supreme Judicial Court has never had occasion to pass on the federal constitutional questions presented in this case.

[Tortured Reading out of Context]

Ground No. 11 objects that there is some inconsistency between the court's decree, which holds the statute unconstitutional merely as applied to the petitioners in this case, and the court's opinion, which states that the statute violates the Federal Constitution because it was a statute respecting an establishment of religion. This objection is based upon a tortured reading of one phrase of the opinion torn out of context. It is apparent that the only question argued or considered was the alleged unconstitutionality of the statute as applied to these complaining persons.

It seems hardly necessary to answer the objection contained in ground 12 of the motion that the decree entered by this court "has the effect of preferring members of the orthodox Jewish faith to members of any other religious sect." This objection ignores, among other things, the fact that the court held that these plaintiffs were unconstitutionally discriminated against. We can only knock out that which we find to be unconstitutionally discriminatory; we cannot go further and legislate a wholly even balance between the competing interests.

[An "Insubstantial" Objection]

Ground No. 14 objects that the decree purports "to restrain only a local police chief and does not extend to a State official", whereas under 28 U.S.C. § 2281 the power of a three-judge court is limited to restraining the action "of any officer of such State in the enforcement or execution of such statute". This objection is insubstantial in view of the answer and stipulation, both of which conceded that the defendant police chief did and would enforce the state law. *Browder v. Gayle*, D.C.M.D.Ala.1956, 142 F. Supp. 707, affirmed 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114. Besides, this question is probably rendered moot by the Attorney General's intervention as a party defendant.

Grounds 13 and 15 may be discussed together. In ground 13 it is objected that "Additional evidence is available as indicated in the minority opinion to establish that the corporate plaintiff in the present proceeding was actually a party in State proceedings and therefore is estopped to obtain the relief requested in the present proceeding." More generally, in ground 15 "the Attorney General seeks a new trial for purposes of clarifying and elucidating further the conflicting factual situation described in the minority opinion."

The State's titling of an indictment brought against "Harold Chernock d/b/a Crown Market" cannot be laid at the door either of Chernock or of the corporation. Further, the plaintiff Crown Market is certainly a corporation, whereas, as the answer admits, the state prosecution and conviction were solely of the individual Chernock. See also *Browder v. Gayle*, supra. The auxiliary civil action in the state courts never reached the merits before its dismissal as moot. Moreover, grounds 13 and 15 are both insufficient in failing to indicate what clarifying evidence could be introduced at a new trial, unless the only evidence is that described in the dissenting opinion. Assuming that it is so, the movant has wholly failed to demonstrate either that the failure to introduce such evidence was excusable or, more important, that any new evidence is available which would affect the result.

[What Might Have Been]

It may be that the case might have been presented to us differently if another had been in charge of defending it. But we must act on the evidence presented to us in an adversary proceeding, not on matters dehors the record found in an ex parte investigation. *Webster Eisenlohr, Inc. v. Kalodner*, 3 Cir., 1944, 145 F.2d 316, certiorari denied 1945, 325 U.S. 867, 65 S.Ct. 1404, 89 L.Ed. 1986.

An order will be entered denying the motion for a new trial.

McCARTHY, District Judge, dissents from the denial of the motion for a new trial, and reserves the right to file a memorandum at a later date.

[Appendices Omitted]

TRANSPORTATION

Passenger Seating—Alabama

Lillie BOMAN v. J. W. MORGAN, Eugene Connor, J. T. Waggoner, Individually and as Members of the Board of City Commissioners of Birmingham, Alabama, and Birmingham Transit Company, a corporation.

United States District Court, Northern District, Alabama, Southern Division, November 23, 1959, Civil Action No. 9255.

SUMMARY: Thirteen Negroes brought a class action for declaratory and injunctive relief in federal district court against the Birmingham, Alabama, city commissioners and a city-franchised, privately owned transit company, alleging that defendants had applied an ordinance so as to deprive them of rights secured by the United States Constitution and civil rights statutes. The ordinance authorized local public carriers to regulate passenger seating and provided that "a willful refusal to obey a reasonable request of an operator . . . in relation to the seating of passengers . . . shall constitute a breach of the peace." It was alleged particularly that the commissioners had agreed among themselves under color of law to compel obedience to the ordinance with respect to segregated seating of Negro passengers and that the company had conspired with the commissioners. The facts were established: that on October 14, 1958, the commissioners enacted the ordinance, repealing other ordinances specifically requiring segregation in public transportation; that on October 15, the company posted notices so advising employees, but stating that signs had been placed in the buses reading: "WHITE PASSENGERS SEAT FROM FRONT, COLORED PASSENGERS FROM REAR," and instructing operators that if passengers should refuse to comply therewith to notify the dispatcher's office; that on October 20 plaintiffs refused to comply with the seating rule, whereupon a police officer, not called by any company employee, arrested nine of the plaintiffs; and that plaintiffs were jailed and later convicted of breach of the peace before the city recorder. The federal court dismissed the action as to the transit company, on the reasoning that although the company's rule was an expression of a continued policy of segregation in seating, plaintiffs' civil rights were not violated thereby because the company acted as a private person, and not under color of law, in spite of the fact that it holds a city franchise. Even if the rule were promulgated under the old segregation ordinances, the court ruled that after repeal of the ordinances there could no longer be any implication of conspiracy arising from the pursuit of parallel policies by the city and company. It was emphasized that no company employee was shown to have instigated or participated in the arrests, or collaborated or ratified the prosecutions, or otherwise acted under color of law. However, the court stated that the police had no legal right to direct plaintiffs where to sit because of color nor to arrest the nine who refused to move, that the ordinance attacked did not authorize or justify such conduct, and that the officers violated plaintiffs' civil rights in arresting and imprisoning them. But it was held that the evidence failed to show that the commissioners had formed any policy to apply the new ordinance in a racially discriminatory manner, the police having acted on their own judgment and volition. Declaratory and injunctive relief were refused without prejudice, but the case was retained as to the commissioners and kept "pending for a reasonable time."

GROOMS, District Judge.

OPINION AND ORDER

On November 12, 1958, plaintiffs, Negro citizens of the City of Birmingham, filed their class action against J. W. Morgan, Eugene Connor and J. T. Waggoner, individually, and as members of the Board of City Commissioners of the

City of Birmingham, Alabama, and the Birmingham Transit Company, a corporation. They aver that the City of Birmingham has enacted an ordinance designated as No. 1487-F¹ granting

1. "ORDINANCE NO. 1487-F
"AN ORDINANCE RELATING TO CARRIERS
OF PASSENGERS FOR HIRE.
"BE IT ORDAINED By the Commission of the
City of Birmingham as follows:
"Section 1. That carriers of passengers for hire

defendant Birmingham Transit Company and other carriers of passengers for hire operating in the City authority to formulate and promulgate rules and regulations for the seating of passengers on public conveyances operated by them. They further aver that said ordinance has been applied by the defendants so as to deny them the rights, privileges and immunities of citizens of the United States and to deny them the equal protection of the laws as secured by the Fourteenth Amendment to the Federal Constitution, and the rights and privileges secured to them by Title 42, United States Code, §§ 1981 and 1983.² They also prayed for relief against the City of Birmingham, a municipal corporation, but by the pre-trial order of June 17, 1959, it was ruled that the relief prayed for was not available against the City of Birmingham.³

Plaintiffs aver that defendants, Morgan, Connor and Waggoner have agreed among themselves and under color of law to compel obedience to Ordinance 1487-F with respect to segregation of plaintiffs and other Negro citizens as passengers on the buses of the Birmingham Transit Company and that the latter company, acting in concert with those defendants, has conspired and continues to conspire to deny these plaintiffs and other Negroes similarly situated the rights guaranteed to them by the Constitution and laws of the United States.

On October 14, 1958, the Commissioners of the City of Birmingham enacted ordinance No. 1486-F repealing Sections 1002 and 1413 of the General City Code, which required racial segregation of passengers in street cars, buses and taxicabs within the City, and made failure to comply therewith a misdemeanor; following which, and on the same date, the challenged ordinance (No. 1487-F) was enacted.

operating in the City of Birmingham are authorized to formulate and promulgate such rules and regulations for the seating of passengers on public conveyances in their charge as are reasonably necessary to assure the speedy, orderly, convenient, safe and peaceful handling of passengers.

"Section 2. A willful refusal to obey a reasonable request of an operator or driver of such a public conveyance in relation to the seating of passengers thereon shall constitute a breach of the peace."

2. No mention is made of Section 1985(3). However, the averments of the bill, as herein indicated, encompass that section. *Baldwin v. Morgan, et al.*, 5 Cir., 251 F.2d 780, 891.
3. *Charlton v. City of Hialeah*, 5 Cir., 188 F.2d 421; and *Hewitt v. City of Jacksonville*, 5 Cir., 188 F.2d 423.

[Used Removable Boards]

Prior to October 14, the Birmingham Transit Company used removable color boards attached to the tops of the seats to segregate the races on its buses. Upon the aforesaid action of the Commissioners, it painted signs in the front and rear of its buses reading: "White Passengers seat from Front, Colored Passengers from Rear." At the same time it posted on its bulletin board for perusal by its employees two bulletins⁴ advising them of the passage of the ordinance and instructing them in the loading of passengers.

On the morning of October 20, 1958, plaintiffs met at the office of a local finance company and marched in a body to Second Avenue and Nineteenth Street, boarded a bus driven by I.

4.

"BULLETIN ORDER

"BIRMINGHAM TRANSIT COMPANY

"Date Effective: Thursday, October 16, 1958

"Bulletin Order No. 176

"Subject: ORDINANCE COVERING THE SEPARATION OF RACES

"ALL CONCERNED:

"As you have seen in the newspapers, the City Commission has unanimously repealed all bus segregation ordinances to become effective Thursday, October 16, 1958. Signs have been placed in front and rear of all of our buses which read as follows:

"WHITE PASSENGERS SEAT FROM FRONT
COLORED PASSENGERS FROM REAR

"Every effort should be used to avoid conflicting problems. May we suggest that you use calmness and your very best judgment in handling any situation that might arise.

"J. E. Crutchfield

Superintendent of Transportation."

"BULLETIN ORDER

"BIRMINGHAM TRANSIT COMPANY

"Date Effective: October 16, 1958

"Date Posted: October 15, 1958

"Bulletin Order No. 177

"SUBJECT: HANDLING OF PASSENGERS

"ALL OPERATORS:

"In view of the repealing of ordinances having to do with the separation of passengers on buses, the following instructions are set forth in order that each operator will be relieved of the responsibility for problems that might possibly be encountered.

"If instances should arise wherein passengers do not comply with the reasonable rules that are now in effect with reference to seating in buses, the operator will approach the passengers involved and talk with them in a tactful manner and in a low voice, and request the cooperation of such passengers in complying with Company rules to further the safe and peaceful handling of passengers.

"If the parties refuse, then you will notify the Dispatcher's office by nearest telephone as you have been doing.

"You are aware of the existing conditions, and we request that you use calmness and your very best judgment in handling any situation that might arise.

"J. E. Crutchfield

Superintendent of Transportation."

M. Daniel, paid their fares, and seated themselves in the front portion of the bus. The operator closed the door, requested the plaintiffs to move to the rear, and when they failed to do so, called his supervisor, and held the bus until the assistant supervisor, Mr. Webb arrived. Webb asked the operator to again request the plaintiffs to move to the rear of the bus. This request to move to the rear was likewise refused. During the incident a traffic officer of the City of Birmingham came upon the scene. By this time a large crowd had assembled. The officer called the operator on the Police desk who notified Captain Haley, who in turn went to the scene and ordered the operator to proceed to the barn. He also directed Sergeant McDonald to follow the bus to keep down possible disorder. When the bus arrived at the barn, Captain Haley and Lieutenant Wooley, also of the police department, boarded the bus and arrested nine of the plaintiffs after they refused to move on the driver's request, made either without or on the direction of Captain Haley. See Appendix for Captain Haley's testimony. Some of the passengers moved to the rear. On direction of Captain Haley, his subordinate entered on the jail slips disorderly conduct charges against those arrested.⁵ These plaintiffs were taken to jail where they were confined until 2:00 a.m., at which time they were released on bond. They were subsequently tried and convicted of breach of the peace before the City Recorder. The imposition of sentences was withheld and they were confined to jail for four or five days, awaiting sentences. After sentences were imposed, they were released upon appeal bonds.

[Did Nothing But Sing]

Plaintiffs, upon taking their seats in the front portion of the bus, did nothing but sing and try to have a good time. There was no cursing, disorder, loud, or boisterous noises while they were on the bus.

Captain Haley made the arrest on his own judgment without any instructions from the Chief of Police or any of the City Commissioners; he knew of no instructions by any of the Commissioners to arrest colored people seating themselves in front on transit buses. Mr. Webb did not call the police. There had been

no discussion by the members of the police department with agents of the Transit Company as to what should be done if Negroes seated themselves in the white section of a bus. The drivers had been instructed not to call the police, but to call the dispatcher in the event of a failure to obtain voluntary compliance with the rule respecting seating. During the five years preceding the incident involved no one connected with the Transit Company had called the police for help in enforcing the company's rule as to seating.

Segregation on its cars, coaches and buses was a Transit Company policy, which found expression in the rule referred to. The rule remained unchanged to the time of the incident. The discontinuance of the use of the color boards was an economy move adopted upon the purchase of a large number of new buses, the seats for which were not made to accommodate these boards. The company began receiving the first of these buses very shortly before the repeal of the old ordinance and the adoption of the new ordinance. The changeover from color boards to signs at approximately the same time as the action of the Commissioners appears to have been purely coincidental.

[Suit Pending]

At the time of the repeal of Sections 1002 and 1413 of the City Code there was pending in this court a suit by Viola Cherry, et al., against the Transit Company and the three Commissioners, challenging the constitutional validity of said sections. This action had been set for trial on October 30, 1958.

Sections 1002 and 1413 of the City Code were compulsory segregation sections, the violation of either of which constituted a misdemeanor. If we assume that the Transit Company's rule was promulgated under the compulsion of said sections, or was drafted in compliance therewith, or in recognition of the custom prevailing in this area of the South respecting the segregation of the races on public conveyances,⁶ it does not follow that the Transit Company acted in concert with the other defendants, or conspired with them to deprive the plaintiffs of rights guaranteed to them under the Constitution and laws of the United States, or is bound by their acts merely because of the existence of the rule and the sections during the same period of time.

5. The actual charges placed in the Recorder's Court were disorderly conduct, conspiracy to commit a breach of the peace and a breach of peace.

6. *Bullock v. Tamiami Trail Tours, Inc.*, 5 Cir., 288 F.2d 326.

The custom, usage and policy of the Transit Company as to segregated seating on its buses paralleled the segregation policy of the City up to the time of the repeal of the sections referred to, but, beyond that, any implication of concert of action or conspiracy arising from the pursuit of common or parallel policies disappears in the light of the evidence to the contrary.

[*Drivers Instructed*]

The bus drivers had received definite instructions not to call the police in the event an incident such as here involved arose. For at least five years no agent, servant, or employee of the Transit Company had called the police for help in the enforcement of the Company's rule relative to seating. There is no evidence that prior to that time they were ever called. In each instance of difficulty voluntary compliance with the seating rule had been secured.

On the occasion in issue no one from the Transit Company called the officers. The bus was escorted to the barn from the crowded downtown intersection upon instruction of Police Captain Haley and under his direction. No one connected with the Transit Company instigated, directed, requested, or participated in the arrests.⁷ The police captain made the arrests and placed the charges on his own judgment. The evidence fails to reveal any collaboration on the part of any employee of the Transit Company in the prosecutions that followed, and it does not show any ratification thereof.

There are certain interpretations of the Fourteenth Amendment and Sections 1981 and 1983, enacted for its enforcement, which have become settled law.

Private parties, who may act independently with impunity, cannot escape liability where they actively assist agencies of a state government in depriving a person of rights guaranteed by the Fourteenth Amendment and the laws enacted thereunder.⁸ Although acting independently, a private party will also be liable if he acts under color of state law.⁹ On the other hand, it has

been repeatedly held that the civil rights statutes do not have the effect of bringing under federal control private rights against invasion by individuals.¹⁰

In *Shelley v. Kraemer*,¹¹ the Supreme Court said that the "amendment erects no shield against merely private conduct, however discriminatory or wrongful"; and added that so long as the purpose of the restrictive agreements there involved

"... are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."

In *Browder v. Gayle*,¹² Judge Rives, speaking for the majority of the three-judge court, said:

"In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835. Indeed, we think that such liberty is guaranteed by the due process clause of that Amendment."

In *Garmon v. Miami Transit Co., Inc.*,¹³ where the Transit Company was joined with the City of Miami and its Commissioners, the Court, in dismissing the Transit Company as a party, said:

"... The decisions of the Supreme Court in civil rights cases of all types and kinds are directed to State (or City) officials acting in their official capacity and those decisions have not been directed to either private individuals or private business firms and indeed there is no constitutional prohibition affecting the freedom of private businesses to regulate their businesses within the law, nor is there any constitutional authority to impose upon them the burden to either enforce or not to enforce segregation in their private affairs."

7. Upon arrival at the barn, the driver renewed his prior request that the passengers move to the rear of the bus, but the evidence does not reveal that the driver knew or had cause to believe that the arrests would follow.

8. See, *Valle et al. v. Stengel et al.*, 3 Cir., 176 F.2d 697, and *Picking v. Pennsylvania R. Co.*, 3 Cir., 151 F.2d 240.

9. *Flemming v. South Carolina Elec. & Gas Co.*, 4 Cir., 224 F.2d 752, 239 F.2d 277.

10. *Bottone v. Lindsley*, 10 Cir., 170 F.2d 705; *Williams v. Yellow Cab Co. of Pittsburgh*, 3 Cir., 200 F.2d 302.

11. 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441.

12. 142 F.Supp. 707, affirmed 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114.

13. S.D.Fla., 151 F.Supp. 953 (1955); affirmed 5 Cir., 253 F.2d 428.

The fact that the Transit Company operates under a franchise from the City of Birmingham does not deprive it of its status as a private business firm or make it an agency of the City or the State.¹⁴

[Custom Not State Action]

The customs of the people of a state is held not to constitute state action,¹⁵ and a custom is no more or no less a custom because it finds expression in a formal rule. Whether segregated seating is secured by custom, policy, or usage, so long as its accomplishment is by voluntary adherence, divorced from state action, no violation of civil rights is presented. The fact that the custom has also found expression in an ordinance does not alter the principle stated. Otherwise, independent individual action would be interdicted by the mere existence of the ordinance.

The Court, in this nondiversity action, is without jurisdiction to afford relief for a mere breach of the contract of carriage, if there was such, unaccompanied by a violation of the plaintiffs' civil rights.

The evidence here presented does not make out a case under the Civil Rights statutes for an injunction, for declaratory relief, or for damages against the Birmingham Transit Company.

Ordinance 1487-F is not challenged as being unconstitutional on its face, but the challenge is upon the ground that it is being applied in an unconstitutional manner.

Rights incorporated in the Fourteenth Amendment are not absolute and unlimited. They are subject to the need for order without which they would be a mockery.¹⁶ Their exercise should not be attended with a breach of the peace or other violation of the law. On the other hand, a party should not be deprived of the rights secured by this amendment under simulated charges of such nature. All forms of governmental racial discrimination, whether cleverly fashioned or free of disguise, are illegal.

14. See, *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F.2d 845; and *Watkins v. Oaklawn Jockey Club*, D.C. Ark., 86 F.Supp. 1006, affirmed 183 F.2d 440.

15. *Williams v. Howard Johnson's Restaurant*, supra.

16. *Tribune Review Publishing Co. v. Thomas*, W.D.Pa., 153 F.Supp. 486, aff. 254 F.2d 883; Also *United Public Workers of America v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754.

[Broad Import]

A charge of "a breach of the peace" is one of broad import and may cover many kinds of misconduct.¹⁷ However, the Court is of the opinion that the mere refusal to obey a request to move from the front to the rear of a bus, unaccompanied by other acts constituting a breach of the peace, is not a breach of the peace. In as far as the defendants, other than the Transit Company, are concerned, plaintiffs were in the exercise of rights secured to them by law.

The word "willful" in the context of a criminal statute or ordinance has been variously defined, but generally means an act done voluntarily and purposely with the specific intent to do that which the law forbids. The purpose or intent motivating a person in the attempted exercise in a lawful manner of a right guaranteed by law does not deny to him the enjoyment of that right. It is, therefore, of no consequence that the plaintiffs were "willful" in their refusal to obey the request to move from the front to the rear of the bus.

Under the undisputed evidence, plaintiffs acted in a peaceful manner at all times and were in peaceful possession of the seats which they had taken on boarding the bus. Such being the case, the police officers were without legal right to direct where they should sit because of their color.¹⁸ The seating arrangement was a matter between the Negroes and the Transit Company. It is evident that the arrests at the barn were based on the refusal of the plaintiffs to comply with the request to move since those who did move, though equally involved except as to compliance, were not arrested.

[Rights Violated]

Under the facts in this case, the officers violated the civil rights of the plaintiffs in arresting

17. The 1944 Code of the City of Birmingham provides as follows:

"Sec. 311. Disorderly conduct defined.

"Any person who disturbs the peace of others by violent or offensive conduct, or carriage, or by loud or unusual noises, or by profane or obscene or offensive language, or any person who shall commit any act or diversion causing or tending to a breach of the peace, or any person who shall be guilty of lewd, immoral or indecent conduct, or any person who shall use any obscene or filthy language in a public place, or any person who shall commit any act or diversion tending to or calculated to debauch the morale of any person, shall be deemed guilty of disorderly conduct, and, upon conviction, shall be punished as provided in section 4 of this code."

18. *Flemming v. South Carolina Elec. & Gas Co.* (Footnote 9), supra.

and imprisoning them. Ordinance 1487-F, and their "willful" refusal to move when directed to do so, did not authorize or justify their conduct.

From the foregoing conclusion, it does not necessarily follow that the Commissioners are pursuing a fixed policy of discrimination.

There is a very strong presumption that public officers will in good faith discharge their duties and observe the law.¹⁹ The Commissioners are requested to "be bound by Oath or Affirmation" to support the Constitution.²⁰ The presumption of compliance will prevail until overcome by clear and convincing evidence to the contrary.²¹

If Ordinance 1487-F is simply a projection of Sections 1002 and 1413, enacted as a sham to perpetuate discrimination in bus seating, and is being enforced to that end, the challenge to its constitutionality in application must be sustained.

If the Court was reviewing the constitutionality of Sections 1002 and 1413, it would need only follow a line already drawn²² and apparently recognized by the Commissioners in their action in repealing those sections. The line here is not so well drawn.

A single discriminatory act, supported by other evidence of intention and purpose to discriminate because of race, may well establish a pattern that must be condemned as illegal.

The Supreme Court, in *Snowden v. Hughes*,²³ in construing a statute, fair on its face, made the following pronouncement:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, cf. *McFarland v. American Sugar Co.*, 241 U.S. 79, 86-7, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or

class over another not to be inferred from the action itself, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-4. But a discriminatory purpose is not presumed, *Terrance v. Florida*, 188 U.S. 519, 520; there must be a showing of 'clear and intentional discrimination,' *Gundling v. Chicago*, 177 U.S. 183, 186; see *Ah Sin v. Wittman*, 198 U.S. 500, 507-8; *Bailey v. Alabama*, 219 U.S. 219, 231. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. *Neal v. Delaware*, 103 U.S. 370, 394, 397; *Norris v. Alabama*, 294 U.S. 587, 589; *Pierre v. Louisiana*, 306 U.S. 354, 357; *Smith v. Texas*, 311 U.S. 128, 130-31; *Hill v. Texas*, 316 U.S. 400, 404. But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *Virginia v. Rives*, 100 U.S. 313, 322-3; *Martin v. Texas*, 200 U.S. 316, 320-21; *Thomas v. Texas*, 212 U.S. 278, 282; cf. *Williams v. Mississippi*, 170 U.S. 213, 225.

If the repeal of Sections 1002 and 1413 and the adoption of ordinance No. 1487-F was a bona fide about face and not merely a detour, a declaration that a policy of discrimination on account of race has been established and that an injunction should issue to terminate the same should not be decreed.

Only six days had elapsed from the time the Commissioners acted until the "test" was made. The arrests and imprisonment of the plaintiffs were without the knowledge or permission of the Chief of Police or the Commissioners. The evidence wholly fails to reveal that they had formed any policy, actually or tacitly, to apply 1487-F in a racially discriminatory manner. The police captain acted solely on his own judgment and volition. The Commissioners had a right to assume, until put on notice to the contrary, that the police officers of the City would observe the law in the performance of their duties. Under like conditions they had a right to assume that the charges placed by Captain Haley were placed in good faith. If it be said that they ratified his acts by not holding a pre-trial session to determine the validity of the charges, the Court doubts that their non-action in this one instance established a policy of discrimination, whatever

19. 20 Am.Jur. 174.

20. Article VI, Clause 3, United States Constitution.

21. *Nat'l Labor Relations Board v. Bibb*, 5 Cir., 188 F.2d 825; and *Barnes v. City of Gadsden, N.D.Ala.*, 174 F.Supp. 64; aff. 268 F.2d 593.

22. *Browder v. Gayle*, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, 142 F.Supp. 707.

23. 321 U.S. 1, 8-9, 64 S.Ct. 397, 88 L.Ed. 497.

might be their liability for damages for his acts under other applicable principles.

[Action Discretionary]

It has been repeatedly held that the exercise of jurisdiction under the Federal Declaratory Judgments Act is discretionary and not compulsory.²⁴ The remedy by injunction is likewise discretionary.²⁵

In the light of the action repealing Sections 1002 and 1413, and considering all the evidence, the Court is of the opinion that a declaration that the Commissioners are pursuing a policy of racial discrimination with respect to bus seating is not presently merited. It follows that injunctive relief will be denied. However, this cause will not be dismissed as to the defendants Morgan, Connor and Waggoner, but will be retained and remain pending for a reasonable time. It will be dismissed as to the Birmingham Transit Company.

J. S. Phifer, the only plaintiff to testify, was one of nine arrested. There are thirteen plaintiffs. The names of the other eight cannot be ascertained from the evidence. For aught appearing, the other four were not on the bus. To avoid a further piecemeal disposition, the Court will also withhold a ruling as to any damages Phifer may be entitled to recover.

It is, therefore, ORDERED, ADJUDGED and DECREED:

24. *Smith v. Moss Mutual Life Ins. Co.*, 5 Cir., 167 F.2d 990; *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 62 S.Ct. 1173, 36 L.Ed. 1620.
25. *Peay v. Cox*, 5 Cir., 190 F.2d 123.

1. That this action be and the same is hereby dismissed as to the defendant Birmingham Transit Company, a corporation, at the costs of plaintiffs.

2. That the declaratory and injunctive relief prayed for be denied without prejudice, however.

3. That this action be retained and remain pending for a reasonable time awaiting the further and appropriate orders of this Court.

Done and Ordered, this the 23rd day of November, 1959.

APPENDIX

Q. Did you request the bus operator to request the Negro passengers who were seated up front to move to the rear of the bus?

A. I don't recall requesting him. I asked him if he had asked them, individually, and he told me that he had asked them as a group but he didn't think he had individually.

My best recollection is that I just asked the questions, and he then requested them individually. He did that in my presence.

Q. Did he ask them individually?

A. That is correct.

Q. Did they move?

A. There were three or four, possibly five, that did comply with his request. There were nine that did not.

Q. And you then placed them under arrest?

A. That is correct.

TRIAL PROCEDURE Confessions—Arkansas

James BOYD and Willie Henry Byrd v. STATE of Arkansas.

Supreme Court of Arkansas, October 12, 1959, 328 S.W.2d 122.

SUMMARY: Four Negro men were charged with killing a white man. Two of them obtained severances and were individually convicted in Arkansas state court trials and sentenced to death. The remaining two defendants were jointly tried, convicted, and sentenced to death, from which judgments they appealed to the state supreme court. One appellant contended that his confession had been illegally admitted into evidence because involuntarily made. But the court held that the trial judge had correctly ruled that the state's evidence of absence

of coercion was sufficient to take the issue of voluntariness to the jury on instructions that the burden of proof was on the state to show that the confession had been made without hope of reward or fear of punishment and thereby to overcome the presumption that confessions of defendants made while in custody of officers are involuntary. It was further held that the trial court correctly ruled that the other appellant's "confession" was involuntary and not to be considered by the jury because it had been given under circumstances which put the accused under fear of public violence; and it was not error for the trial court to admit testimony that the latter appellant, being put in a state penitentiary for "safekeeping", failed to deny anything in statements of the other defendants that he had assisted in the assault and robbery of deceased, although he had been then advised that if the statements were inaccurate he should so state. This ruling was upheld because the jury was instructed that, although generally a conspirator's statements are inadmissible in the trial of a co-conspirator, if they should find here that such statements had been voluntarily given and that the appellants had heard and understood them and had had opportunity to express themselves concerning the statements, the jury could consider the appellants' reactions to them, but that such statements were not to be construed as appellants' statements. The judgments were affirmed.

McFADDIN, Justice.

Appellants, James Boyd and Willie Henry Byrd, were convicted in the Miller Circuit Court in December 1958 of the crime of first degree murder for the homicide of M. R. Hamm. They were each sentenced to death; and from such judgments they prosecute this appeal.

This is the second appearance of these appellants in this Court in connection with the homicide of M. R. Hamm. In *Moore v. State*, 227 Ark. 544, 299 S.W.2d 838, there were four appellants, being James Moore, Rogers Boone, James Boyd (present appellant), and Willie Henry Byrd (present appellant). After the reversal in the said case of *Moore v. State*, James Moore obtained a severance. He was again tried, convicted, and sentenced to death; and we affirmed that judgment in *Moore v. State*, Ark., 315 S.W.2d 907; and the United States Supreme Court denied *certiorari* on January 26, 1959. 358 U.S. 946, 79 S.Ct. 356, 3 L.Ed.2d 353. Rogers Boone likewise obtained a severance; was again tried, convicted, and sentenced to death; and we affirmed that judgment in *Boone v. State*, Ark., 327 S.W.2d 87.

[No Objection Requiring Reversal]

The present appellants, James Boyd and Willie Henry Byrd, waived severance and were jointly tried in December 1958, convicted, and sentenced to death, as aforesaid; and those judgments are now before us on this appeal. This being a capital case, we have reviewed every objection in the record (§ 43-2723 Ark.Stats.);

and find no objection that requires a reversal. We discuss, however, some of the objections.

I. *Motion To Quash The Information.* This motion related to both of the defendants and was urged because the appellants were being tried on an information filed by the Prosecuting Attorney instead of an indictment returned by a Grand Jury. We fully discussed this point and held it to be without merit in *Moore v. State*, Ark., 315 S.W.2d 907; and what we there said is applicable here.

II. *The Case Against Willie Henry Byrd.* Appellant Byrd says that his confession was illegally admitted into evidence. It was shown that M. R. Hamm died on May 9, 1956; that Byrd and the other three thought to be implicated in the murder of M. R. Hamm, were taken into custody on May 15, 1956; that the Prosecuting Attorney's office was at Arkadelphia, a distance of about eighty miles from Texarkana; that Byrd and the other three accused persons were advised that they would be taken to Arkadelphia to the Prosecuting Attorney and then to the State Penitentiary at Cummins Farm south of Pine Bluff; that the four prisoners were in the back seat of the car and three officers in the front seat; that they reached Arkadelphia about 8:00 P.M. and were served with food; that the prisoners were questioned separately and sometimes together; that appellant Byrd was advised that he did not have to make any statement; that Byrd's statement was made freely and voluntarily; that the statement was signed by him; that Moore and Boone both signed statements; and that all of the prisoners were then taken to the State Penitentiary at Cummins Farm for safekeeping.

[Burden on State]

The burden was on the State to prove that the confession was voluntary. *Love v. State*, 22 Ark. 336; *Smith v. State*, 74 Ark. 397, 85 S.W. 1123; and *Cush v. State*, 180 Ark. 448, 21 S.W.2d 616. In determining whether a confession is voluntary, the Court should look to the whole situation and surroundings of the accused. *Dewein v. State*, 114 Ark. 472, 170 S.W. 582; *Brown v. State*, 198 Ark. 920, 132 S.W.2d 15. When the State sought to introduce the appellant's confession, the hearing was recessed to the Judge's chambers for the Trial Judge—in the absence of the jury—to see if there was sufficient evidence of voluntariness to submit the issue to the jury. Such is in accordance with our frequently stated procedure. *Charles v. State*, 198 Ark. 133 S.W.2d. 26; *Brown v. State*, 198 Ark. 920, 132 S.W. 15; *Hendrix v. State*, 200 Ark. 973, 141 S.W.2d 852; *Nolan and Guthrie v. State*, 205 Ark. 103, 167 S.W.2d 503. The Trial Court correctly ruled that there was sufficient evidence offered to take the case to the jury on the voluntariness of the confession of Byrd, and, thereupon, the hearing was resumed before the jury.

We hold that there was abundant evidence to take the case to the jury as against Willie Henry Byrd; that the jury was correctly instructed¹; that there was abundant evidence

1. The Court instructed the jury as to the confession: "Instruction No. 13. There is evidence here that the defendant Byrd made statements against interests, written, or oral, or both. Before you can consider any statement against interests as evidence, you must find:

"1st. That he did make a statement against interest.

"2nd. That the statement he did make was the one you heard on the witness stand.

"3rd. That when he made it, he told the truth.

"4th. That any statement made by him, the defendant Byrd, was voluntarily made.

"In order for a statement against interests to be voluntary you must find that it was made without hope of reward or fear of punishment. The basis of the statement, that statements against interest must be voluntary, is that the Constitution of our State says that no person shall ever be compelled to give evidence against himself.

"The presumption of law is that any statements made by a defendant, when he is in custody of officers, whether those officers be the sheriff, detectives, policemen, the prosecuting attorney, or any other law enforcement officer, is involuntary and incompetent and cannot be considered by you.

"The effect of that presumption is to cast the burden of proof upon the State to prove by a preponderance of the evidence that the statements were voluntary. The State must overcome this presumption of law to your satisfaction and show that the statements were voluntary; that is, made freely without hope of reward or fear of punishment."

to support the conviction; and that there was no error in the record. The judgment against Byrd is, therefore, affirmed.

III. *The Case Against James Boyd*. The Trial Court refused to allow the alleged confession of Boyd to be considered in any way because one of the State's witnesses gave testimony which convinced the Trial Court that Boyd's confession was not voluntary. The said witness—a law enforcement officer—testified as to the following remarks he made to Boyd on May 15, 1956 before the body of M. R. Hamm had been found:

"Well, we were walking up and down a ditch there, for half a mile, looking for a hammer. And I was questioning him about the disappearance of Mr. Hamm. And I told him that we believed that he and this other boy, Boone, had killed him. And he denied it; and we were walking up and down this ditch, and we talked all the time about it, and I kept telling him over and over—I guess I told him a hundred times in different forms, that they had killed this man, and that they had hidden his body, and that there was a group of white people looking for him, and that they would believe the same things we believed, under the circumstances, and it would be lots better for him to go ahead and tell me about it. I pointed out to him that he would be in considerable danger if this large group of white people were to find this man's body and come to the conclusion that he had committed the crime. And we talked along that line for a long time. And finally, he says, 'I didn't do it, but I was there,' or words to that effect."

[Involuntary Confession]

Because of the foregoing testimony the Trial Court correctly ruled that Boyd's confession was involuntary, and the Court told the jury:

"Now as to Boyd, you are told that there is no confession as to Boyd and you are again admonished not to consider any testimony as respects any such confession allegedly made by him, the defendant Boyd."

The Trial Court was correct in refusing to allow the alleged confession made by Boyd to be considered by the jury. As we pointed out in discussing the Byrd confession, the burden is on

the State to prove that the confession was voluntary; and in determining whether a confession is voluntary the Court should look at the whole situation and surroundings of the accused. When the law enforcement officer told this Negro prisoner that there was a large group of white people looking for him and if they found Mr. Hamm's body they would come to the conclusion that he (Boyd) had committed the crime, the voluntariness of the confession was certainly destroyed until it was shown that the Negro had reached a place secure against any such "large group of white people" looking for him.

[Prisoners Transferred for Safety]

But on the night of May 15th the four prisoners, Boyd, Byrd, Moore, and Boone, were transported to the State Penitentiary south of Pine Bluff for safekeeping; and on May 18th, three days later, the Prosecuting Attorney, along with two law enforcement officers, went to the penitentiary to see the four prisoners. The statements of Moore and Boone were read to Boyd in the presence of Moore and Boone, after Boyd had been advised that if there was anything in the said statements that was erroneous, he should so state. This was three days after Mr. Hamm's body had been found; Boyd was safe in the penitentiary and secure from any possible "large group of white people"; so any fear induced by the officer's statement of May 15th had been dissipated. In their said statements read to Boyd, Moore and Boone each stated that Boyd was in concert with them² and assist-

2. Moore said in his statement: "Boyd slapped him and then I hit him. I hit him on the face. We didn't hit him too hard. Boone had one hand and Boyd was holding the other hand of the white man"

"Q. What was the man hit with? A. With our fists and hands.

"Q. Did you see any blood on the man? A. Yes, around his eye was a ring and around his mouth.

"Q. Was there a lot of blood? A. Not too much.

"Q. Did you get any on you? A. No.

"Q. Did any of the other boys get any blood on them? A. No, I didn't see any.

"Q. How many times did you knock the man to the ground? A. Several times.

"Q. Did the man ask you not to hit him any more? A. Yes, he said that he would give us the money.

"Q. How many times was the man knocked into the ditch? A. Several times and then Boyd and Boone would reach down and pick him up and hit him again.

"Q. How long did you all beat on this man? A. It was not too long, about 15 minutes.

"Q. Where was the man the last time you saw

ed in the assault and robbery of Mr. Hamm.

In admitting this testimony of Boyd's failure to make any reaction to the statements of Moore and Boone, the Trial Court immediately cautioned the jury:

"Gentlemen of the jury, it is my duty—the Court's duty—to remind you at this time that this purports to be a statement of Rogers Boone, who is not a defendant in this trial. It is not to be considered in any manner as a statement made by either or both of these defendants, and the same rule of law applies as to the restricted area in which you may consider their reaction, if they had an opportunity to freely react to this statement, and at the close of all the case the Court will again, as a matter of precaution, admonish you relative to the law as regards this statement and the Moore statement."

[Failure to Deny Admissible]

Boyd made no denial of any of the statements which his co-conspirators had made in his presence, and his failure to make such denial was admissible in evidence against him. In *Moore v. State*, Ark. 315 S.W.2d 907, 913, we quoted from *Martin v. State*, 177 Ark. 379, 6 S.W.2d 293:

"* * * it is a general rule that the statements of one accomplice made in the presence and hearing of another which are not contradicted by him are admissible in evidence against him as an admission on his part for his failure to contradict them. *Polk v. State*, 45 Ark. 165; *Ford v. State*, 34 Ark. [649], 654."

"In 20 Am.Jur.428, 'Evidence', § 493, the general rule is stated:

him? A. Lying in the ditch on his back on the bank of the road with his feet in the ditch."

Boone said in his statement: "* * * we got out and then James Boyd grabbed him on the collar and slapped him and said what have you got and then Poochie slapped him and said what have you got and I slapped him too and then James Moore slapped him too. . . ."

A. James Boyd and then James Moore hit him over the head with a board and then James Boyd slapped him and turned him loose and the man fell into the ditch and didn't get up.

"Q. How was the man lying the last time you saw him? A. He was lying with his feet toward the highway, on his elbows and his feet toward the road.

"Q. Where was the man's hat? A. Out in the ditch."

"The rule precluding the use of the confessions of co-conspirators and codefendants as evidence against those not making the confessions is limited to confessions made in the absence of such other defendants. A confession of a co-conspirator or codefendant made in the presence of the accused and assented to by him, impliedly or tacitly by his silence or conduct, is admissible against him, upon the same principles which permit the introduction of evidence that the defendant stood silent when accused of crime, but it must appear that he did assent to the confession."

"We, therefore, conclude that there was no error in the Court's ruling on the point here involved."

[Instructions Given]

Other witnesses testified as to the four co-conspirators being together on the day of Mr. Hamm's disappearance; Hamm's body was found by information furnished by some of the conspirators; and other substantial evidence was introduced. In the instructions the Court told the jury:

"Instruction No. 14. The alleged confessions of Moore and Boone have been introduced in this case. You are instructed that it is the general rule of law that the statements of a conspirator are not admissible in the trial of a co-conspirator. However, if such statements are made in the presence of a co-conspirator, his reaction to that statement is admissible under certain conditions.

"So, in this case, if you find from a preponderance of the evidence that the statements of Moore and Boone were freely and voluntarily given; and if you further find beyond a reasonable doubt that the defendants Byrd and Boyd heard and understood those statements, were called upon to freely

act or reply and had an opportunity to express themselves concerning such statements, you may consider their reactions thereto.

"You are again cautioned, as the Court told you this morning, that no statements made by Moore or Boone are to be construed as being a statement of Byrd or Boyd themselves.

"Instruction No. 19. You are instructed that while it is the law of this State that all who join in the common design to commit an unlawful act, the natural and necessary consequence of which involved the contingency of taking life, they are responsible for the homicide committed by one of them while acting in pursuance and furtherance of the common design, although it might not have been the contemplation of the parties when they conspired to commit the unlawful act and although the actual perpetrator is not specifically identified; yet, you are further instructed that the homicide, if any, must be perpetrated while in the commission of the crime of robbery and must be the natural and necessary result of the unlawful act, and if you find from the evidence in this case that the deceased, M. R. Hamm, died from any cause not the natural and necessary result of an unlawful act, you will find the defendants not guilty of murder in the first degree."

[Judgment Affirmed]

We hold that there was ample competent evidence to take the case to the jury as against Boyd; that the Court committed no error prejudicial to Boyd in its rulings; that the jury was properly instructed; and that the evidence amply supports the verdict. We, therefore, affirm the case against James Boyd, just as we did against Willie Henry Byrd.

TRIAL PROCEDURE

Counsel's Remarks—Alabama

George COSBY v. STATE of Alabama.

Supreme Court of Alabama, August 20, 1959, 114 So.2d 250.

SUMMARY: A light-skinned Negro was tried in an Alabama state court for first degree murder of another Negro. Upon inquiry by the solicitor as to whether defendant had appeared drunk, one of the state's witnesses testified that defendant's face had turned red, whereupon the solicitor inquired, "His face is kinda white now?" The trial court excluded the remark and instructed counsel to be careful in their imputations, but overruled a motion for a mistrial. After being convicted, defendant appealed, alleging, *inter alia*, that the quoted remark constituted an appeal to race prejudice. The Alabama Supreme Court affirmed. Although recognizing that every defendant is guaranteed a fair, impartial trial free from undue appeals to prejudice, the court stated that it was doubtful that the remark complained of could be construed as an appeal to race prejudice, but that since the trial court excluded it anyway it was not of such a nature as to require the granting of a mistrial.

SIMPSON, Justice

Appellant was indicted, tried and convicted of murder in the first degree and his punishment fixed at life imprisonment. He has appealed to this court.

Although assignments of error were not necessary, appellant has noted them and they are helpful in our study of the case. These assignments raise the only questions meriting treatment so we will limit discussion to them.

Assignment of error 24 predicates error on the refusal of the trial court to grant appellant's motion for a mistrial. During the solicitor's examination of Josie Grigsby, witness for the State, the following occurred:

"Q. Now, did George [appellant] and Darden and Price [deceased] do some drinking while at your house? A. Yes, sir, they was.

"Q. They did some drinking and did they appear to be drunk? A. They didn't act like that. The only thing I notice about George, his face turned red.

"Q. His face turned red. His face is kinda white now?"

Appellant objected and the court stated, "That's out". Thereupon appellant made a motion for a mistrial which was overruled and the

trial court instructed counsel to be cautious in their imputations. Counsel for appellant argues that appellant is a light-skinned Negro and that the above remark of the solicitor constituted an appeal to race prejudice. The victim, Price Bridgeforth, deceased, was also a Negro.

The law guarantees to every defendant, white or Negro, a fair and impartial trial, free from undue appeals to prejudice or other improper notice. *Tannehill v. State*, 159 Ala. 51, 48 So. 662; *Williams v. State*, 25 Ala.App. 342, 146 So. 422; *Harris v. State*, 22 Ala.App. 121, 113 So. 318. "Justice is blind, says the law, and in her judgment must see no man, color, race, or condition." *Jones v. State*, 21 Ala.App. 234, 109 So. 189, 191.

It is most doubtful that the remarks complained of could be construed as an appeal to race prejudice, but the trial court excluded them anyway and we are not willing to say that they were of such a nature as to require the granting of a mistrial. *Owens v. State*, 215 Ala. 42, 109 So. 109; *Davis v. State*, 233 Ala. 202, 172 So. 344; *Johnson v. State*, 35 Ala.App. 645, 51 So. 2d 901, see also *Birmingham Railway, Light & Power Co. v. Gonzalez*, 183 Ala. 273, 61 So. 80.

* * *

We find no error to reverse.
Affirmed.

TRIAL PROCEDURE

Fair Trial—Military Courts

John A. BENNETT v. Colonel James W. DAVIS, Commandant, Colonel Raymond E. Jessen, Officer in Charge, United States Disciplinary Barracks, Fort Leavenworth, Kansas.

United States Court of Appeals, Tenth Circuit, May 12, 1959, 267 F.2d 15.

SUMMARY: A federal disciplinary barracks prisoner, while serving with the United States Army in Austria, was convicted and sentenced to death for rape and attempted premeditated murder in violation of the Uniform Code of Military Justice. He made application to a federal district court for a writ of habeas corpus, alleging in part that he had not been adequately represented by counsel during his court-martial or military review; that his pre-trial statement had been involuntarily obtained and improperly admitted in evidence; and that his trial had been conducted in an atmosphere of hostility, racial prejudice and tension. From an order dismissing the writ, he appealed to the Court of Appeals for the Tenth Circuit, which affirmed. This court held that the court below had rightly held that petitioner was precluded from raising these issues in a collateral proceeding after having failed to do so at any stage of the proceedings in the military courts. It was pointed out, however, that there was nothing in the record to indicate that the trial had been conducted in an atmosphere of racial prejudice or tension, or under circumstances which would deprive petitioner of a fair and impartial trial.

Before MURRAH, LEWIS and BREITSTEIN, Circuit Judges.

MURRAH, Circuit Judge.

This appeal is from an order dismissing a writ of habeas corpus after a full hearing. Petitioner, John A. Bennett, while serving with the United States Army in Austria, was convicted and sentenced to death for rape and attempted premeditated murder in violation of Articles 120 and 80, Uniform Code of Military Justice. 10 U.S.C. §§ 920, 880. Pursuant to the provisions of Articles 61, 64, 66 and 67(b) (1), Uniform Code of Military Justice, (10 U.S.C. §§ 861, 864, 866, 867(b) (1)) the conviction and sentence was approved by the Convening Authority, Judge Advocate General of the Army Board of Review, and that decision was affirmed by the United States Court of Military Appeals. *United States v. Bennett*, 7 USCMA 97, 21 CMR 223. Thereafter the President of the United States, acting under the provisions of Article 71(a) of the Code (10 U.S.C. § 871(a)), approved the sentence and directed the execution under the order of the Secretary of the Army. While confined in the United States Disciplinary Barracks, Ft. Leavenworth, Kansas, he brought this application for a writ of habeas corpus, challenging the judgment and sentence on the ground that he was not adequately represented by counsel during his court-martial or during his military review; that his pretrial statement was involuntarily obtained and improperly admitted in evidence; that his

trial was conducted in an atmosphere of hostility, racial prejudice, and tension; and, that the court martial was without jurisdiction to try him because Austria (where the alleged crime was committed) being a sovereign nation, had exclusive jurisdiction over his person and the offense charged.

[Habeas Corpus Inquiry Scope]

It is now settled beyond doubt that the scope of inquiry in habeas corpus cases of this kind is limited to whether the court-martial had jurisdiction of the person and the offense charged; and whether, in the exercise of that jurisdiction, the accused was accorded due process of law as contemplated and vouchsafed by the Uniform Code of Military Justice. We inquire only to determine whether competent military tribunals gave fair and full consideration to all of the procedural safeguards deemed essential to a fair trial under military law. *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508; *Thomas v. Davis*, 10 Cir., 249 F.2d 232, and cases cited.

Acting within this scope of inquiry, the trial court found that none of the contentions with respect to adequacy of counsel, involuntary pre-trial statement, hostility and racial prejudice were raised at any stage of the proceedings in the military courts; and rightly held that the petitioner was thus precluded from presenting

any of these issues in this collateral proceedings. And see *Whelchel v. McDonald*, 340 U.S. 122, 71 S.Ct. 146, 95 L.Ed. 141; *Suttles v. Davis*, 10 Cir., 215 F.2d 760. But even so, the trial court observed that the United States Court of Military Appeals had taken special note of the competency of petitioner's counsel, saying: "Defense counsel at trial, Captain James H. Boyle, defended with vigor and fidelity what was clearly a very difficult case. He conceded nothing, explored everything, was fully prepared on each issue, and made the most of what he had." *United States v. Bennett*, 7 USCMA 97, 102. And, the trial court went further to ascertain that when the issue concerning the voluntary nature of the pre-trial statement was raised in the military court, the law officer of the court advised the

petitioner of his right to testify for the limited purpose of determining the voluntariness of his pre-trial statement, whereupon the petitioner elected to remain silent.

There is nothing in the record to indicate that the trial was conducted in an atmosphere of racial prejudice or tension, or which would deprive petitioner of the rudiments of a fair and impartial trial. Indeed, as far as we can ascertain, this suggestion was first made in the trial below and it comes too late. We agree with the trial court that the military court gave full and fair consideration to every constitutional safeguard contemplated by the Uniform Code of Military Justice.

. . .

The judgment is affirmed.

TRIAL PROCEDURE

Instructions—California

PEOPLE of the State of California v. John MORRIS, Jr.

District Court of Appeal, Second District, Division 1, California, October 1, 1959, 344 P.2d 333.

SUMMARY: An illiterate Negro, convicted of the first-degree murder of a bartender who refused to serve him, asked on appeal that the facts of the assault be correlated with his background and education, as well as with the locale of the crime, Los Angeles' "skid row." In affirming the conviction, the court held that there had been no miscarriage of justice, defendant having been adequately represented and there being no authority for giving him special consideration because he was a resident of the area in question.

LILLIE, Justice.

Defendant was accused by information of the charge of murder of one Burke, to which he pleaded not guilty and waived a jury trial. The court adjudged him guilty, fixed the crime as first-degree murder and sentenced the defendant to the state prison for life. He has appealed from the judgment of conviction and the order denying his motion for a new trial.

On October 18, 1956, shortly after 2:00 a.m., two men entered a bar on East Fifth Street and asked for a certain brand of cigarettes, which they then purchased. The two departed and almost immediately reentered the premises; one was the defendant. His companion demanded a drink of Burke the bartender. According to Mary Birchfield, a waitress present at the time,

Burke said to the men: "I am sorry, boys, it is after hours. We are closing up and going home." She further testified that there was no "loud talking or anything." Defendant then produced a long-bladed knife with a pearl handle from his right pants pocket. As Burke shoved the waitress aside, defendant stabbed him on his left side up close under the ribs. . . .

The autopsy report described six major incised wounds, most of them on the left side. Death was ascribed to stab wounds of the chest and heart with cardiac tamponade. Other conditions noted were stab wounds of the lungs and liver with internal hemorrhage.

. . .

In the course of the police investigation, defendant stated in substance to an officer (the

statement being prefaced by the word "supposin'"): If a bartender refused you a drink because of race, had a club and hit you, what would you do? When questioned later as to this statement, defendant told the police: "Well, I said, 'just supposin', and I didn't say it was me that did it." There is otherwise a complete absence of any showing that the defendant and the deceased had ever seen each other before.

[*Defendant's Background, Crime's Locale*]

Finally, we are asked to correlate the facts of the assault with appellant's background and education, as well as the locale of the crime. This, it seems to us, is out of harmony with the proper concession made in appellant's brief that the murder is one of first degree only if it were the

result of deliberation and premeditation. True, appellant is an uneducated Negro who can neither read nor write, although he can print his name, and we take judicial notice and knowledge of the fact that the events in question occurred on the city's "skid row." Throughout the proceedings, however, appellant was adequately represented by counsel; and no authority is cited for the suggestion that special consideration should be accorded appellant because he was a resident, by choice or necessity, of the area in question. A careful examination of the entire record convinces us that there was no miscarriage of justice.

For the reasons stated the judgment and order appealed from are affirmed.

FOURT, Acting P. J., and SHEA, J. pro tem., concur.

TRIAL PROCEDURE

Instructions—Pennsylvania

COMMONWEALTH of Pennsylvania v. Samuel H. ROSS.

Superior Court of Pennsylvania, July 3, 1959, 152 A.2d 778.

SUMMARY: Defendant, one of two young colored men who allegedly had forcible sexual intercourse with a white girl, was convicted in a Pennsylvania trial court, of rape, conspiracy to commit rape, conspiracy to rob, and aggravated robbery. On appeal, the Superior Court affirmed. It ruled that the trial court had not erred by: (1) creating sympathy for the prosecutrix by commenting that her emotional state while testifying was understandable; (2) admonishing the jury to attempt conscientiously to harmonize their views when they appeared to be unable to reach a verdict; (3) cautioning the jury against being unduly swayed by defense counsel's highly emotional summation speech; and (4) referring to race in his instructions on further deliberations, the instruction being more favorable to defendant than to the Commonwealth. Excerpts from the opinion are printed below.

ERVIN, Judge.

It is also claimed that the court below created sympathy for the prosecutrix. In support of his contention, appellant points to an occasion when defense counsel raised the point of the victim's emotional state while testifying at a previous trial and the court said: "What would you expect of any person on the witness stand under these circumstances? Would she be entirely calm, in your opinion?" We are in accord with

Judge Oliver's disposition of this contention, as follows: "This question obviously was directed at the fact that *any* young prosecuting witness in *any* rape case, whether or not *in fact* the rape had occurred, would be emotionally upset while undergoing close questioning on the intimate details of the rape before a courtroom of people. Counsel . . . attempts to read something into the Court's remark that clearly was not there. It is evident from counsel's failure to object at the time of trial that at that time he then under-

stood the Court's comment in the spirit in which it was intended."

[*Verdict Not Coerced*]

The jury was not coerced into giving a verdict against the defendant. Appellant states in his brief that the jury was charged on four different occasions. A review of the record will reveal that the jury was charged once and instructed briefly on other occasions. After deliberating for approximately two and a half hours, the jury informed the court that they could not agree upon a verdict. The trial judge then said to the jury: "I would like you to go out and see if you cannot possibly reach a verdict. I am not forcing you to do it at all, but I would like you to make a further effort, strictly on the evidence and the charge of the Court as to the law." The jury then further deliberated and finally agreed upon a verdict of guilty. This was not coercion of the jury. In *Com. v. Campbell*, 116 Pa.Super. 180, 189, 176 A. 246, 250, it is stated: "It is entirely proper for a trial judge, in an endeavor to prevent another long and expensive trial, to admonish a jury as to the propriety and the importance of agreeing on a verdict, and he may urge the jury to make every reasonable effort to harmonize their views and to bring in a verdict consistent with their consciences."

[*Confinement of Argument*]

It is further contended by the appellant that it was error for the court to tell the jury not to be swayed by defense counsel's speech in summation. The court said: "I want to say just one

word to you. You heard a tremendously emotional plea—talk about crucifying someone. There is no effort to crucify anybody in this Court. You have a simple question of fact: Is the defendant guilty, or isn't he? I want you to go out and calm down and come back and realize you have to deal with the facts, and you have to apply to those facts the law as I shall outline it." This was not a statement by the court that the jury was not to be swayed by defense counsel's speech. It was merely an attempt by the trial court to correct flagrant misstatements made by counsel. There was no evidence in this case that anybody was being "crucified." It is the duty of the court to confine the arguments of counsel within the limits of legitimate advocacy. *Com. v. Nelson*, 294 Pa. 544, 144 A. 542; *Com. v. Wood*, 118 Pa.Super. 269, 179 A. 756; *Com. v. Kauffman*, 155 Pa.Super. 347, 38 A.2d 425; *Com. v. Phillips*, 183 Pa.Super. 377, 132 A.2d 733.

It is also argued that the court's reference to race while instructing the jury on further deliberation, constituted a tool for coercing a verdict against the defendant. The instruction given by the court was more favorable to the defendant than to the Commonwealth and the court carefully instructed the jury that it was to make a further effort strictly on the evidence and the instructions as to the law. It was entirely proper for the court to give this instruction. *Com. v. Cisneros*, supra. 381 Pa. at page 453, 113 A.2d 293.

Judgments affirmed.

TRIAL PROCEDURE Instructions—Federal Courts

UNITED STATES of America v. Alandus Eugene MARSHALL.

United States Court of Appeals, Seventh Circuit, April 23, 1959, 266 F.2d 92.

SUMMARY: A sixteen-year-old Negro, convicted in a federal district court in Illinois of rape and of feloniously taking money by force, violence, and intimidation on a federal reservation, appealed, alleging, *inter alia*, that the trial court erred in refusing his requested jury instruction that, "It is the duty of the jury to consider the prisoner's case as if he were a white man,

for the law is the same, there being no distinctions in its principles in respect to color." The judgment was affirmed by the Court of Appeals for the Seventh Circuit, which held that such refusal was not prejudicial error. "If the trial court is charged with so instructing a jury in a case of this kind, may it not also be called upon to instruct on any other fact of race, creed, color or individual physical peculiarity?" asked the court, stating that it is more suitable to inquire about color prejudice upon the voir dire examination of prospective jurors.

TRIAL PROCEDURE

Judgments—Texas

Lucille POWELL v. Herman SANDERS.

Court of Civil Appeals of Texas, Texarkana, April 21, 1959, 324 S.W.2d 587.

SUMMARY: A white man sued a Negro woman in a Texas state court for damages allegedly sustained in an automobile collision caused by defendant's negligence. Defendant asserted certain defenses and set out a cross action alleging damages caused by plaintiff's negligence. From an adverse judgment, defendant appealed, contending, inter alia, that she had been denied a fair trial because racial prejudice was the only explanation for the jury's denying her recovery and finding that plaintiff's automobile had been damaged nearly \$100 more than the estimated cost of repair. The judgment was affirmed, the court holding that the record was devoid of indications of prejudice by the judge, counsel, or jury toward defendant; that experienced jurors could readily conclude that the loss in value of a wrecked vehicle could exceed the repair cost; and that prejudice is not shown simply because the successful party in a lawsuit is white and the unsuccessful one is a Negro.

CHADICK, Chief Justice.

Appellee, Herman Sanders, as plaintiff, sued appellant, Lucille Powell, as defendant, in a district court of Smith County. He alleged a collision occurred at the intersection of West 5th and South College Streets in the City of Tyler, and that the appellant was guilty of nine separate acts of negligence which jointly and severally were the proximate cause of the collision and Sanders' injuries and damages. Appellant Powell's answers pled four special defenses and set out a cross-action against Sanders in which Sanders is charged with negligence in 10 separate respects, which negligence is alleged to be the proximate cause of injury and damage suffered by appellant Powell.

In a jury trial special issues were submitted and answered by the jury. On appellant's motion the jury's answer to Special Issue 27 was disregarded by the trial court and judgment was

entered on the remaining issues. Appellee Sanders was awarded \$500 for personal injuries and as a result of disregarding the automobile damage issue (27) he was denied a recovery for property damage. A take-nothing judgment was entered against appellant Powell. Appellant's motion for new trial was overruled and an appeal has been perfected to this Court.

* * *

[Prejudice Alleged]

Appellant argues that it is undisputed in the record that her pick-up was seriously damaged in the collision, that she herself was injured, unable to work and suffered damages as a consequence thereof, and that the record shows without question that the fault of the collision lay upon appellee Sanders. Also the point is made that the jury answer to Special Issue 27 allowed appellee damage in excess of that shown by undisputed evidence. Upon such premises she

bases Points 7 and 8, asserting error of the trial court in rendering judgment because of the prejudice and errors in the record as a whole are cumulative and denied her a fair trial; and that the court erred in not granting her motion for new trial. Supporting the premises of this argument she points out that she is a Negro woman and the appellee is a white man, and contends that prejudice is the only explanation for the jury finding that appellant suffered no damage and finding appellee's damage to his automobile to be \$500 when the only witness testifying as to cost placed the cost of repair at slightly over \$400.

The record has been carefully examined and it does not sustain appellant's Points 7 and 8. There is no contention that the trial judge in his charge or in the conduct of the case showed any prejudice or ill will towards appellant. Neither is there any contention that any overt conduct or remarks of counsel in any phase of the case indicated a prejudice toward appellant, nor is there any contention of any overt display of prejudice by the jury. In fact, the record is devoid of any hint that the racial origin of either party had the slightest consideration of judge or jury in the course of the trial. If prejudice is evidenced, it must be found from the fact that the jury answered issues unfavorably to her.

[Prejudice Not Proved]

Finding appellee's car damage to be nearly \$100 more than the cost of repair can be accounted for upon a basis other than prejudice. Experienced jurors could very readily conclude that the loss in the value of a car that had been in a collision could exceed the value of cost of repair. A car repaired after collision usually has less value than a similar car which has not undergone damage and repair if such fact is known to buyers. Appellant testified to her injuries and loss and the jury was privileged to accept or reject her testimony in whole or in part. To hold that prejudice is shown simply because the successful party is white and the unsuccessful party is a Negro would mean that no judgment could stand unless it favored the Negro. Where the testimony conflicts one or the other must lose the verdict. As pointed out in the discussion of Point 2, there is evidence supporting the verdict; the same may be said upon the other issues which were found against the appellant. The cumulative effect of the acts and rulings assigned as error, if erroneous, is not such as to have deprived appellant of a fair trial and there was no error in overruling her motion for new trial.

• • •

The judgment of the trial court is affirmed.

TRIAL PROCEDURE

Juries—Georgia

Edward HALL v. STATE.

Supreme Court of Georgia, October 9, 1959, 110 S.E.2d 661.

SUMMARY: A Negro was convicted in a Georgia superior court of voluntary manslaughter for killing another Negro. He then filed an extraordinary motion for a new trial, urging that there had been discrimination against his race in the selection of jury commissioners and jurors in violation of his rights under the federal and state constitutions. The motion was dismissed and the state supreme court affirmed, because neither defendant nor his trial counsel attached to the motion affidavits that they did not know at the time of the trial of the matters set forth in the motion and that they could not have discovered them by exercising reasonable diligence, such affidavits being essential to this kind of motion relying upon newly discovered evidence. The proper procedure, said the supreme court, where illegality of a grand jury returning an indictment is known, is by challenge to the array before the in-

dictment is found, and, where it is not known before the indictment, by plea in abatement to the indictment. Such a question, having been waived by failure to take either step, cannot be raised for the first time in a motion for a new trial.

HEAD, Justice.

SYLLABUS BY THE COURT

The trial judge did not err in dismissing the extraordinary motion for new trial.

The plaintiff in error was indicted for the offense of murder on March 14, 1939, and on April 19, 1939, was convicted of voluntary manslaughter and given a minimum sentence of 12 years and a maximum sentence of 15 years. His extraordinary motion for new trial reveals that he is a Negro, and was placed on trial for the killing of another Negro. He urges that there has been a violation of his rights under the Federal and State Constitutions because of the discrimination against his race in the selection of jury commissioners and jurors, to the same extent as was urged in *Avery v. State*, 209 Ga. 116, 70 S.E.2d 716.

The extraordinary motion for new trial was filed on May 21, 1959, and was dismissed on June 2, 1959, it being recited in the order that it "is hereby dismissed for the reason that the grounds of the motion do not make out such case as would authorize the court to hear and consider the same as an extraordinary motion, and no reason appearing why the question here sought to be raised was not or could not have been raised at the time of the original trial, said motion is not good as an extraordinary motion and can not be entertained as such."

The plaintiff in error excepts to the order dismissing his extraordinary motion for new trial.

OPINION

The record is silent as to why the sentence imposed upon the plaintiff in error has not long since been terminated and completed by service. If so served, he could not again be placed in jeopardy even on his own motion for new trial. If the defendant escaped, and has not served his sentence, and should now not be in the custody of the proper authorities of this State, he would not, as a matter of law, be entitled to have the record of his former trial reviewed. *Gentry v. State*, 91 Ga. 669, 17 S.E. 956. Since there is no proper showing as to the facts referred to, we

will not assume a state of facts to exist not shown by the record, and will therefore dispose of the case upon the legal questions.

[*Essential Affidavits Lacking*]

There is not attached to the extraordinary motion for a new trial any affidavit by the movant, or any affidavit by counsel representing him upon his trial, to the effect that they did not know of the matters and things set forth in his extraordinary motion at the time he was tried and could not have discovered them by the exercise of reasonable diligence. Such affidavits are essential to an extraordinary motion for new trial where newly discovered evidence is relied upon. *Code*, § 70-205; *Redding v. State*, 183 Ga. 704, 189 S.E. 514; *Mills v. State*, 193 Ga. 139, 17 S.E.2d 719; *Taylor v. Perdue*, 206 Ga. 763, 58 S.E.2d 902; *Hart v. State*, 207 Ga. 599, 63 S.E.2d 390. There is an affidavit by present counsel for the movant to the effect that "he believes and has reason to believe that the matters contained therein are true." In his brief filed in this court present counsel for movant states: "It would be hypocrisy bordering upon fraud to claim that by due diligence the affiant now discovered the fact of discrimination in jury selection which was common knowledge in 1939."

Grounds relied upon for showing illegality of the grand jury returning an indictment should be by a proper challenge to the array of grand jurors before the indictment is found, where the illegality is known, or, if not known by the defendant or his attorney before indictment, by plea in abatement to the indictment. Where there is neither challenge to the array nor plea in abatement, such questions can not be raised for the first time in a motion for new trial. *Edwards v. State*, 121 Ga. 590 (2), 49 S.E. 674; *Lumpkin v. State*, 152 Ga. 229(7), 109 S.E. 664; *Cornelius v. State*, 193 Ga. 25, 30(5), 17 S.E.2d 156; *Williams v. State*, 199 Ga. 504, 507(3), 34 S.E.2d 854.

[*Objection Waived*]

"It is settled law in this State that, when a panel of jurors is put upon the prisoner, he should challenge the array for any cause which

would go to show that it was not fairly and properly put upon him, and that if he fails to do so, the objection is waived and can not thereafter be made a ground of a motion for new trial." *Williams v. State*, 210 Ga. 665, 667, 82 S.E.2d 217, 218, and cases cited.

In *Crumb v. State*, 205 Ga. 547, 54 S.E.2d 639, and *Avery v. State*, 209 Ga. 116, 70 S.E.2d 716 (reversed by the Supreme Court of the United States, *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244), objections similar

to those sought to be raised in the present case were timely and properly made.

Under the Constitution of this State (Article VI, Section II, Paragraph IV, Code, Ann., § 2-3704), the Supreme Court is a court "for the trial and correction of errors of law." It not appearing that any error of law was committed, the judgment dismissing the extraordinary motion for new trial is

Affirmed.

All the Justices concur.

TRIAL PROCEDURE

Petit Juries—Colorado

William E. MONTOYA v. The PEOPLE of the State of Colorado.

Supreme Court of Colorado, November 9, 1959, 345 P.2d 1062.

SUMMARY: In a robbery trial in a Colorado state court, defendant sought to have the jury panel quashed because "persons having spanish-sounding names were systematically excluded" although there were such persons in the county qualified for such service. It was shown that no person with a Spanish sounding surname had appeared on the county jury list for the last eight years; that from 1955 to 1957 the gross jury lists, from which petit juries are drawn, contained some 5400 names, none of them having a Spanish sounding surname; that in 1958 there were two Spanish surnames out of 1600 names on the gross lists, but neither of them served on a petit jury; and that the 1950 census had revealed a county population of more than 17,000 persons of whom 719 had Spanish sounding surnames. The prosecution offered the testimony of public officials who denied that there was a practice of systematic exclusion or that they knew of a policy to promote such exclusion. The trial court refused to quash the panel, and the defendant, upon conviction, brought a writ of error in the state supreme court. The judgment was reversed and the cause remanded, the court holding that the facts shown constituted a prima facie case of systematic exclusion which was not overcome by the general assertions by county officials of performance of their duties, and that discrimination was indicated whether or not it resulted from conscious official decisions.

KNAUSS, Chief Justice.

Plaintiff in error, herein referred to as defendant, was convicted and sentenced in the Logan County District Court for the crime of simple robbery. He brings the case here on writ of error assigning two principal grounds for reversal, to-wit:

1. That the trial court erred in refusing to quash the panel of jurors because "persons having spanish-sounding names were systematically excluded from service on the petit jury, although there were such persons fully qualified to serve as such in Logan County." It is alleged that

this fact denied the defendant equal protection of the law as guaranteed by the Federal and State Constitutions, and

2. That the trial court erred in denying a motion for mistrial when it appeared that defendant was brought into court manacled, in view of the jurors immediately prior to their voir dire examination.

[Pattern of Proof Necessary]

Hernandez v. Texas, 347 U.S. 475, 98 L.Ed. 866, 74 S.Ct. 667, is directly in point. There the defendant was convicted of murder and prior

to trial, as in the instant case, a motion was made to quash the jury panel. There it was asserted that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors and petit jurors. The judgment of conviction was reversed, the court approving the pattern of proof necessary to show systematic exclusion used in *Norris v. Alabama*, 294 U.S. 587. In the *Norris* case the essential matters to be considered in determining if a systematic exclusion of a certain class of jurors exists are: (a) That the class claimed to be excluded forms a substantial segment of the population of the county. (b) That some of the class are qualified to serve as jurors and (c) That a mere token or no members of the class have served on the jury over an extended period of time.

In *Honda v. People*, 111 Colo. 279, 141 P.2d 176, it was said referring to the *Norris* case, supra; *Neal v. Delaware*, 103 U.S. 370, and *Carter v. Texas*, 177 U.S. 442, "We do not question the law as laid down in those cases."

[*Prima Facie Case*]

Here we have a defendant of Spanish-American descent, with a spanish sounding surname, charged with a crime. It was amply proved that there were persons having spanish sounding surnames on the tax rolls of Logan County and who were qualified to act as jurors. It was further shown, without contradiction, that in the last eight years no persons with spanish sounding surnames appeared on the jury lists. From 1955 to 1957 the gross jury lists, from which the petit jury is drawn, contained some five thousand four hundred names. Not one spanish sounding surname appeared on these lists. In 1958 there were two spanish surnames out of one thousand six hundred names. Neither of these persons served on the petit jury. Counsel stipulated that the 1950 U.S. census gave Logan County a population of more than seventeen

thousand persons and that the same census showed that of this number 719 persons had spanish sounding surnames.

[*People's Rebuttal Evidence Inadequate*]

To rebut the prima facie case thus made, the People offered the testimony of public officials who denied the practice of systematic exclusion and knowledge of a policy designed to promote such exclusion. As was said in *Norris v. Alabama*, supra, "if in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with specific reference to their protection—would be but a vain and illusory requirement." To quote from the *Hernandez* case: "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." See also *Avery v. Georgia*, 345 U.S. 559, *Reece v. Georgia*, 345 U.S. 559, *Reece v. Georgia*, 350 U.S. 85, *Eubanks v. Louisiana*, 356 U.S. 584.

In the instant case defendant was brought into open court before the jury panel manacled. While the doctrine announced in *Eaddy v. People*, 115 Colo. 488, 174 P.2d 717, considered the garb in which a defendant was brought into court for trial, we think the same reasoning should here apply. In the instant case the sheriff who thus brought defendant into open court testified that he could have brought him to court without handcuffing him. *United States v. Dressler*, 112 F.2d 972.

We do not mean to be understood as holding that a defendant can never be brought into court handcuffed, but in this case it was unnecessary and prejudicial to defendant to thus exhibit him before the jury panel.

For these reasons the judgment is reversed and the cause remanded for retrial consistent with the views herein expressed.

TRIAL PROCEDURE

Petit Juries—Illinois

PEOPLE of the State of Illinois v. Melvin HARRIS.

Supreme Court of Illinois, September 24, 1959, 161 N.E.2d 809.

SUMMARY: A Negro, convicted in an Illinois court of unlawful possession of narcotics, brought error, contending, *inter alia*, that the prosecutor's use of peremptory challenges resulted in systematically excluding Negroes from the jury, thereby depriving defendant of equal protection and due process. The state supreme court affirmed, holding that: (1) There was no showing that prospective jurors were excluded solely for racial reasons; and (2) if the state's use of peremptory challenges resulted in excluding Negroes from the petit jury, defendant was not denied constitutional rights, because the right of such challenge, by its very nature, may be exercised or not "according to the judgment, will or caprice of the party entitled thereto, and he is not required to assign any reason therefor."

KLINGBIEL, Justice.

Upon trial by jury in the criminal court of Cook County Melvin Harris was convicted of unlawful possession of narcotics. He was sentenced to imprisonment in the penitentiary for not less than two years nor more than ten. He prosecutes this writ of error, contending that . . . the prosecutor's use of peremptory challenges resulted in excluding Negroes from the jury, thereby depriving defendant, a Negro, of constitutional rights.

* * *

As a final ground for reversal defendant alleges an unconstitutional use of peremptory challenges by the prosecutor in selecting the jurors. He says he was deprived of due process and equal protection because the State exercised the right so as to "systematically" exclude Negroes. Even aside from the absence of any showing that the prospective jurors were excused solely because of race, there is no merit whatever

in the contention. There was no exclusion of Negroes *per se* from the panel itself; and, of course, there were in fact several among the number. The fact that the State's exercise of peremptory challenges resulted in excluding them from the petit jury did not deprive defendant of any constitutional right. *People v. Roxborough*, 307 Mich. 575, 12 N.W.2d 466, certiorari denied 323 U.S. 749, 65 S.Ct. 80, 89 L.Ed. 600. The right of peremptory challenge is a substantial one which should not be abridged or denied. It may, by its very nature, be exercised or not exercised, according to the judgment, will or caprice of the party entitled thereto, and he is not required to assign any reason therefor. 50 C.J.S. Juries § 280, p. 1068.

We have considered all of defendant's contentions and find merit in none of them. The trial was conducted in a fair and capable manner, and the evidence fully supports the verdict. The judgment is affirmed.

Judgment affirmed.

TRIAL PROCEDURE

Juries—Federal Courts

Barbara Luella RIVERS v. UNITED STATES of America.

United States Court of Appeals, Ninth Circuit, September 9, 1959, 270 F.2d 435.

SUMMARY: A Negro woman, convicted in the federal district court for the Territory of Alaska of the first degree murder of her Negro husband, appealed, alleging, *inter alia*, that the trial court erred in not allowing defense counsel "to further question the prospective jur-

ors concerning possible race prejudice" toward a Negro defendant—specifically, in ruling out as improper the question: "Would you object to a Negro living in an apartment next to yours?" In affirming the judgment, the Court of Appeals for the Ninth Circuit declined to say that the trial court had abused its discretion in this regard, because the record failed to indicate what other questions were asked on voir dire or whether the quoted question was the only one asked of a particular juror concerning his attitude toward Negroes, whereas the use of "further" in defendant's appellate brief indicated that other questions along that line had been allowed. Also, the quoted question was held not germane to whether the prospective juror would have such racial prejudice as to prevent or make difficult a fair or impartial verdict. The part of the court's opinion dealing with the race factor is reprinted below.

Before POPE, CHAMBERS, and HAMLEY, Circuit Judges.

POPE, Circuit Judge.

During the course of the voir dire examination, counsel for the defendant asked a prospective juror: "Would you object to a Negro living in an apartment next to yours?" The court ruled the question improper. Because the defendant and her husband were Negroes appellant now contends that this ruling of the court was erroneous and prejudicial; that her counsel should have been permitted to make such an inquiry in an effort to ascertain the attitude of the jurors toward a Negro defendant.

Appellant relies on *Aldridge v. United States*, 283 U.S. 308, 314, 51 S.Ct. 470, 75 L.Ed. 1054, where a Negro on trial for the murder of a white man was held to be entitled to have jurors asked on voir dire whether they had any racial prejudice that would prevent a fair and impartial verdict.

For several reasons it cannot be said here that the trial court abused its discretion in refusing to allow this question to be asked. In the first

place, nothing is shown in the record as to what other questions were asked on the voir dire examination, or whether this was the first question asked relating to the juror's attitude toward Negroes. Apparently this is only one of a series of questions on the subject for one of appellant's briefs states: "The court erred in not allowing the counsel for the defense to *further* question the prospective jurors concerning possible race prejudice." (Emphasis added.) This would indicate that other questions along this line had been allowed. Furthermore, the question, as framed, was not germane to the question whether the juror in acting in the case would have such racial prejudice as to prevent or make difficult a fair or impartial verdict. Whether the juror would object to living in an apartment next door to a Negro is an entirely different question.¹ We find no error in the ruling of the court on this point.

1. See *Lee v. State*, 164 Md. 550, 185 A. 614, 617, where a question whether a juror regarded Negroes as his social equal was held properly excluded.

TRIAL PROCEDURE

Waiver of Procedural Rights—Oklahoma

In the Matter of the Habeas Corpus of James A. COLEMAN

Court of Criminal Appeals of Oklahoma, October 14, 1959, 344 P.2d 1114

SUMMARY: A Negro man, serving a life sentence in an Oklahoma penitentiary after having pleaded guilty in a state district court to a murder charge, petitioned the state criminal appeals court for habeas corpus, contending that, as he had never effectively waived his constitutional rights to advise with counsel and to a jury trial and was not afforded them, the trial court lost jurisdiction to impose sentence. The appellate court found that, while a soldier stationed near Fort Smith, Arkansas, petitioner had been arrested and jailed in that

city for killing a Negro girl in Oklahoma. Petitioner alleged that his request to consult officers at his military station and to have his wife present were ignored by the county attorney, who told him that, as he admitted choking the girl, the best thing for him to do was to plead guilty, for if he did a life sentence would be recommended; and that, in a single day following, he was taken into Oklahoma (apparently without formal extradition proceedings), required to sign various papers, went before a judge and was sentenced to life imprisonment, and was put in the penitentiary. He further claimed that he did not understand the various degrees of homicide as applicable to the case, and that being frightened and inexperienced, he did everything he was told to do in order to escape the electric chair after having been put in fear of it by the county attorney. The state, to excuse the speed of the proceedings, contended the petitioner waived his constitutional rights after they had been explained to him. The court, however, held that when the death sentence may be assessed, and particularly when the accused has no former record, is ignorant, illiterate or with low intelligence, and unable to understand the full import of English words spoken to him, counsel should always be appointed and a plea not accepted until after counsel has had ample time for consultation. Holding that the trial court was without jurisdiction to pronounce the judgment and sentence rendered, the court granted habeas corpus with directions that the plea, judgment, and sentence be vacated and that petitioner be rearraigned and proceeded against therefrom on the information.

PER CURIAM.

James A. Coleman, petitioner, is confined in the State Penitentiary at McAlester, serving a life sentence by reason of the entry of a plea of guilty in the district court of Sequoyah County to a charge of murder.

The record shows that at the time of the entry of the plea in question, petitioner was a soldier stationed at Fort Chaffee, in Arkansas, near Fort Smith. He is a Negro, and the victim was an eighteen-year-old Negro girl. Petitioner was a married man and the girl was also married, but he alleges she was on the way by automobile to Muskogee with petitioner. Petitioner alleges that he was drinking, and that the girl was hysterical for a "fix", she being a dope addict. That he knew nothing about a "fix" and offered the woman a drink and they got into a fight and he choked her, but did not intend to seriously hurt her. That he got water and bathed her face, but to no avail. He was subsequently arrested and placed in jail at Fort Smith. He states, and it is not refuted, that he had never been in trouble with the law before and knew nothing whatever about his constitutional rights, or court procedure. That he asked the county attorney, who appeared at the jail in Fort Smith shortly after his arrest, to permit him to consult his commanding officer, or the government CID officers at Camp Chaffee. His request was ignored and he was told that if he stood trial he would probably "get the electric chair", and that the best thing for him to do was to plead

guilty, because he had admitted choking the girl, and that if he did, a life sentence would be recommended. It appears that the formality of extradition proceedings were not gone through; presumably this was waived, although the record is silent.

Petitioner says that he was frightened and inexperienced; that on the morning of October 4, 1956 he was taken from Fort Smith to Sallisaw, Oklahoma, and required to sign various papers; went before a judge and was sentenced to life imprisonment and was on the same day incarcerated in the State Penitentiary.

[Waiver Explained]

Petitioner claims that by reason of being frightened by the county attorney, and after he was refused permission to consult the military authorities or even to have his wife present and explain to him what was being done, that he just did everything he was told to do. He says that he did not understand the charge or the various degrees of the crime with which he was accused as applicable to his theory of the case. That he did not have any one explain to him his rights other than the county attorney who had put him in fear of the electric chair and had him in a frame of mind to do anything to escape that fate. Although the petition was filed pro se, at hearing before this Court petitioner was represented by counsel of his choosing. And it is earnestly contended that by reason of the facts recited, petitioner never did effectively waive his constitutional rights to advise with counsel and

to be tried before a jury, and that the court lost jurisdiction to impose sentence.

The State in response does not deny that petitioner was brought into Oklahoma on October 4, 1956; was transported from Fort Smith to Sallisaw that day, taken before an examining magistrate and thereafter arraigned in the district court, entered a plea of guilty and on the same day was incarcerated in the State Penitentiary to serve a life sentence.

[State's Contention]

To excuse all this speed the State contends, and the record says, that the defendant's constitutional rights were explained to him and he waived them. And ordinarily, the law so permits. But as said in *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 323, 92 L.Ed. 309-318, and quoted by this Court with approval in *Application of Kinnison*, Okl.Cr., 335 P.2d 645:

"The fact that an accused may tell him [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishment thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

The evidence does not disclose that such a penetrating examination was here made. It could not be expected that the prosecuting attorney would tell the prisoner, as in this case, more than the fact that the extreme penalty was death and that prisoner was entitled to an attorney and to a trial before a jury, but to avoid the possibility of death he should plead guilty and in such case a life sentence would be recommended. So conditioned, the further waiver of extradition, time to plead and all other rights, would be perfunctorily waived.

All this could have been obviated, if not by the penetrating questioning, by granting an ignorant man who plainly did not understand the

full import of the words of the English language spoken to him, permission to consult his commanding officer, the CID or even his wife, with the probable consequence that the Court would have appointed counsel to consult with the accused and understandingly advise him of his rights, and the possible punishment if his theory of the case was believed by the jury.

[Duty to Provide Counsel]

The fact is that under circumstances where the death penalty may be assessed, the court should always appoint counsel to consult with a prisoner and not accept a plea until counsel has ample opportunity for such consultation.¹ Particularly is this true where the accused has no former record of convictions, is ignorant, illiterate or of the apparent intelligence of a moron.

The speed with which the petitioner was whisked from an adjoining state, apparently waiving every right given him by the constitution when from the admissions he might have at the hands of a jury received much lighter punishment than was assessed by the court, supports his evidence that he was so frightened by the ultimatum that he would be given a death sentence if he did not waive all rights and plead guilty, that he was thereby conditioned to do anything asked of him.

Of course on trial the evidence might justify and cause the jury to assess the extreme penalty or a life sentence. On the other hand they might, as suggested, assess a much lighter sentence. At all events, from what has been said in *Application of Kinnison*, supra, and cases cited, it is our opinion that the trial court was without jurisdiction to pronounce the judgment and sentence rendered. The writ of habeas corpus is accordingly granted, with directions that the plea, judgment and sentence be vacated and that petitioner be rearraigned and proceeded against therefrom on the information.

The Warden of the State Penitentiary is directed to deliver the petitioner, James A. Coleman, No. 58654, to the custody of the sheriff of Sequoyah County, Oklahoma, to await the further action of the district court of such County.

1. See case where even though accused had counsel there were penetrating questions as to defendants entry of a plea of guilty. *Williams v. State*, Okl.Cr., 321 P.2d 990, affirmed 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516, petition for rehearing denied 1959, 359 U.S. 956, 79 S.Ct. 737, 3 L.Ed.2d 763.

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LEGISLATURES

EDUCATION Public Schools—Arkansas

Act No. 107 (Senate Bill 279) of the 1959 Arkansas General Assembly, approved February 24, 1959, provides procedures by which a special election may be held in a county of 100,000 population or more to determine whether the county shall be constituted a County Equalizing School District, not altering or affecting, however, the powers or duties of the county's school districts. The Act further provides that, after the establishment of an Equalizing District, the electors thereof may, at the annual school election, vote for allocation to the District of a part (nine mills at the first annual school election and eighteen thereafter) of the total tax proposed by the school board of each district. The monies thus allocated to the Equalizing District are to be used for "equalizing educational opportunities" in the county's public schools, the county board of education being required to distribute the monies to each district in the proportion that its average daily pupil attendance bears to the average daily attendance for all county pupils for the previous year. It is specified, however, that the average daily attendance of a school closed by governor's proclamation under Act 4, Second Extra-Ordinary Session, 1958 [3 Race Rel. L. Rep. 1048 (1958)] shall be that of the year immediately preceding its closing and shall so continue to be until one full year after its reopening. [Note: The Arkansas Supreme Court has held this Act to be in violation of the state constitution. *Henry v. Tarpley*, 324 S.W.2d 503, 4 Race Rel. L. Rep. 855, *supra* (1959)].

"AN ACT to Authorize the Establishment of a County Equalizing School District in Any County of This State That May Now, or Hereafter, Have a Population of 100,000 or More, Upon Approval of a Vote of the Electors of Such County, for the Purpose of Equalizing the Educational Opportunities of All the School Children Attending Public Schools in Such County; to Establish the Procedure for Holding an Election for Such Purpose; to Prescribe the Powers and Duties of a County Equalizing School District; and for Other Purposes."

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Upon the petition of not less than ten per cent (10%) of the qualified electors of each of the school districts within any county in this State that may now, or hereafter, have a population of 100,000 or more according to the most recent federal census at the time of such petition, filed with the County Board of Election Commissioners of said county, said

Election Commissioners shall call a special election in said county, to be held not more than sixty (60) days from the date of filing such petitions, on the question of whether said county shall be a County Equalizing School District as provided in this Act. The most recent poll tax list of the county shall be used in determining the number of qualified electors in each school district.

Section 2. Notice of the date of the special election shall be given by the Election Commissioners by insertion on at least one occasion in some newspaper of general circulation in the county not less than thirty (30) days prior to the date of such election. On the ballot of such special election there shall appear the following:

FOR the County Equalizing
School District ☐
AGAINST the County Equalizing
School District ☐

The voters shall be instructed to mark the vote of their choice by marking an "X" in the

square opposite the vote of their choice. If a majority of the qualified electors in the county voting on the issue at such special election shall vote FOR the County Equalizing School District, the same shall be established and shall be operated according to the provisions of this Act. If a majority of the qualified electors voting in such special election vote AGAINST the County Equalizing School District, the same shall not be established and a special election on the question of establishing such a County Equalizing School District shall not be held again in such county for a period of two years.

Such special election shall be conducted and the results thereof ascertained, determined and certified in the same manner as provided by the laws of this State for general elections.

Section 3. If the electors of the county vote FOR the County Equalizing School District as provided in Section 2 hereof, the County Board of Election Commissioners shall certify the same to the County Clerk of said county, to be placed on record by the County Clerk in the records of his office. Said County Equalizing School District shall be named for the county voting for the same, Thus: "..... County Equalizing School District."

Section 4. The County Equalizing School District shall be composed of the territory of the school districts of the county voting the same. The establishment of a County Equalizing School District shall, in no way, alter, change, or affect any of the powers, duties or existence of any of the school districts of the county.

Section 5. The electors of the County Equalizing School District shall have the power at the annual school election to vote for the allocation to the County Equalizing School District, a portion, as provided herein, of the total tax proposed by the school board of each school district administered within the County Equalizing School District. Such revenue as may accrue from the annual tax allocated to the County Equalizing School District shall be distributed to the respective school districts of the county to be used for equalizing educational opportunities of the public elementary and secondary schools in the county, as provided hereinafter. The County Board of Education shall serve as the Board of the County Equalizing School District, and the County Board of Education of any county to which this Act is applicable shall provide for the

placing on the ballot, in each school district in the County Equalizing School District, at the annual school election the following:

FOR THE ALLOCATION OF MILLS TO
THE COUNTY EQUALIZING SCHOOL
DISTRICT ☐
AGAINST THE ALLOCATION OF MILLS
TO THE COUNTY EQUALIZING
SCHOOL DISTRICT ☐

The number of mills to be allocated to the County Equalizing School District at the first annual school election after the establishment of such District shall be nine (9) mills, and thereafter the number of mills to be allocated the County Equalizing School District shall be eighteen (18) mills. The voters shall be instructed to mark the vote of their choice by marking an "X" in the square opposite the vote of their choice. If a majority of the qualified electors in the County Equalizing School District voting on the issue shall vote FOR the allocation, the appropriate county officials shall levy, collect, and distribute the revenue from such tax to the County Equalizing School District to be used for the purposes of this Act. If a majority of the qualified electors of the County Equalizing School District voting on the issue shall vote AGAINST the allocation of the millage provided above to the County Equalizing School District, the millage shall be levied, collected and credited to the respective school districts of the county by the appropriate county officials. It is the purpose of this Act that the school boards of the respective school districts shall propose the total millage levy for vote in each school district of the county.

Section 6. The County Board of Education shall distribute all monies derived by the County Equalizing School District pursuant to the provisions of this Act as follows:

(a) To each public school district administered within said county a proportional part of the total funds as the average daily attendance of pupils in said district for the previous year bears to all pupils in average daily attendance for the previous year in all the public school districts administered within the county. However, "average daily attendance" of school closed by Governor's Proclamation under Act 4, Second Extra-Ordinary Session, 1958, shall be that of year immediately preceding such closing, and shall continue to be the "average daily attend-

ance" for such school until one full school year after school has been reopened.

(b) The funds so provided under this Act shall be distributed and credited by the County Treasurer, upon order of the County Board of Education, to the school districts administered in said county as now provided by law for the distribution of funds derived from school millage levies. The funds received by the respective school districts of the county pursuant to this Act may be used for the maintenance and operation of schools, the erection and equipment of buildings and the retirement of existing indebtedness.

Section 7. It is the specific intent of this Act to provide a method for equalizing educational opportunities within a county, and nothing contained herein shall amend, alter, diminish, or change any of the existing powers and duties of school districts of this State.

Section 8. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which

can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Section 9. All laws and parts of laws in conflict herewith are hereby repealed.

Section 10. It is hereby found and determined by the General Assembly that school districts in counties of this State having large populations have different taxable wealth; that because of such differences in taxable wealth, many of the school children in the school districts are being deprived of equal educational opportunities in such counties; that the large growth of cities in such counties is being retarded by the lack of equal educational opportunities throughout the county, and that immediate passage of this act is necessary to correct such situation. Therefore, an emergency is hereby declared to exist and this Act, being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.

APPROVED: February 24, 1959.

EDUCATION

Private Schools—Alabama

Act 33 (Senate Joint Resolution 13) of the Second Special Session, 1959 Alabama Legislature, commends the Baptist Association of Selma for establishment of an all-white school.

Whereas the people of this State have made known their intention to close the public schools rather than submit to an enforced commingling of the races in such schools; and

Whereas the experience of other Southern States has demonstrated the wisdom of making adequate provision for the education of our children in the event that public schools are closed; and

Whereas the Baptist Association of the City of Selma, after careful study and preparation, has sponsored that city's first all-white, non-denominational private school, as a foundation for a larger operation should it be needed as a result of future developments; now therefore,

BE IT RESOLVED BY THE LEGISLATURE OF ALABAMA:

That the members of the Legislature do hereby commend the Baptist Association of Selma, the Association's Education Commission, the board of trustees of the school, and other cooperating persons and groups, for their foresight in providing for the establishment and operation of an all-white, non-denominational private school as a basis for a system of private schools within the county, if such becomes necessary, and for their determination to continue the operation of the schools of Selma and Dallas County in accordance with our cherished customs and traditions.

Be it resolved, further, that the Secretary of the Senate transmit a copy of this resolution to Mr. John Becton, of Elkdale, chairman of the school's board of trustees.

EDUCATION**Colleges and Universities—Alabama**

Act 127 of the Second Special Session, 1959 Alabama Legislature, allows the state board of education to provide assistance at the college and university level to Alabama citizens when such instruction is not available at Alabama state-supported institutions.

AN ACT To permit the State Board of Education, by its rules and regulations, to provide assistance to residents of Alabama for instruction on the college or university level not available to them at public, state-supported educational institutions in Alabama.

Be It Enacted by the Legislature of Alabama:

Section 1. The State Board of Education, under such rules and regulations as it shall determine, may provide assistance for residents of Alabama for instruction on the college or university level at private non-denominational institutions when such instruction is not available to such residents at public, state-supported educational institutions in Alabama. The State Board of Education shall, by its rules and regulations, determine the qualifications of persons who may be aided under the provisions of this Act, and the decision as to the qualifications of persons by the State Board of Education shall be final. The State Board of Education may provide assistance for instruction on the college

or university level at any private non-denominational institution as it deems necessary, within or without the state boundaries. The State Board of Education shall provide assistance for such college or university instruction within the limits of the appropriations available for this purpose at a cost per student not exceeding the probable cost of such instruction if it were available at a state-supported institution. The State Board of Education, in providing assistance in such instruction, may take into account differences in travel, tuition, and living expenses.

Section 2. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of laws which conflict with this Act are repealed.

Section 4. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

EDUCATION**Tuition Grants—Alabama**

Act 652 of the Regular Session, 1959 Alabama legislature, permits county and city boards of education to provide assistance for instruction at a private nondenominational institution when such instruction is not available at any public educational institution within the district.

ACT NO. 652, REGULAR SESSION 1959
H. 563

AN ACT, To permit the county, city and independent school district boards of education, by their rules and regulations, to provide assistance to residents of their respective districts for instruction on an elementary or secondary level not available to them in public schools within the district.

Be it enacted by the Legislature of Alabama:

Section 1. The county, city and independent school district boards of education, hereinafter called the local boards of education, under such rules and regulations as they shall determine, may provide assistance for residents of their respective districts for instruction on an elementary or secondary level at a private nondenominational institution when such instruction

is not available to such residents at any public educational institution within the district. The local boards of education shall, by their rules and regulations, determine the qualifications of persons who may be aided under the provisions of this Act, and the decisions as to the qualifications of persons by each of the said boards shall be final. Each local board of education may provide assistance for elementary or secondary school instruction at any private non-denominational institution, as it deems necessary, within or without the district. The local board of education shall provide assistance for such elementary or secondary instruction within the limits of funds available for educational purposes at a cost per pupil not exceeding the probable cost for such instruction if it were available at a public school within the district. The local board of education, in providing assistance in such instruction, may take into consideration differences in travel, tuition, and other expenses.

Section 2. For the purpose of allocating the minimum program fund or other state contributions to the local boards of education, the daily attendance of pupils attending private non-denominational schools and receiving assistance under the provisions of this Act shall be counted as if they were attending public schools within the district.

Section 3. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 4. All laws or parts of laws which conflict with this Act are repealed.

Section 5. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

EMPLOYMENT

Fair Employment Laws—Wisconsin

Chapter 149 (Assembly Bill No. 119), Laws of 1959, of the Wisconsin Legislature, approved June 25, 1959, amends the state Fair Employment Code to bar discrimination in employment solely because of age, and to specify that the term "employer" in the Code shall not include any law enforcement or fire fighting department or organization, nor any person employing individuals in any other hazardous occupation, nor any organization not organized for private profit. Sections 111.31, 111.32(3), and 111.32(5)(a) of the Code appear below with new language in *italics*. Sections 111.32(5)(b) and (c) are entirely new creations.

AN ACT to renumber and amend 111.32 (5); to amend 111.31 and 111.32 (3); and to create 111.32 (5) (b) and (c) of the statutes, relating to barring discrimination in employment because of age.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. 111.31 of the statutes is amended to read:

111.31 (1) The practice of denying employment and other opportunities to, and discriminating against, properly qualified persons by

reason of their *age*, race, creed, color, national origin * * * or ancestry, is likely to foment domestic strife and unrest, and substantially and adversely affect the general welfare of a state by depriving it of the fullest utilization of its capacities for production. The denial by some employers and labor unions of employment opportunities to such persons solely because of their *age*, race, creed, color, national origin * * * or ancestry, and discrimination against them in employment, tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them.

(2) It is believed by many students of the problem that protection by law of the rights of all people to obtain gainful employment, and other privileges free from discrimination because of age, race, creed, color, national origin * * * or ancestry, would remove certain recognized sources of strife and unrest, and encourage the full utilization of the productive resources of the state to the benefit of the state, the family * * * and to all the people of the state.

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, national origin * * * or ancestry. All the provisions of this subchapter shall be liberally construed for the accomplishment of this purpose.

Section 2. 111.32(3) of the statutes is amended to read:

111.32 (3) The term "employer" shall not include *any law enforcement or fire fighting department or organization, nor any person who employs individuals in any other hazardous occupation, nor a social club * * * or religious association, * * * nor organization not organized for private profit.*

Section 3. 111.32 (5) of the statutes is renumbered 111.32 (5) (a) and amended to read:

111.32 (5) (a) The term "discrimination" means discrimination because of age, race, color, creed, national origin * * * or ancestry, by an employer individually or in concert with others against any employee or any applicant for employment in regard to his hire, tenure or term, condition or privilege of employment, and by any labor organization against any member or applicant for membership, and also includes discrimination on any of said grounds in the fields of housing, recreation, education, health and social welfare.

Section 4. 111.32 (5) (b) and (c) of the statutes are created to read:

111.32 (5) (b) It is discrimination because of age:

1. For an employer, labor organization, or person in the fields of housing, recreation, education, health and social welfare, or any licensing agency, because an individual is between the ages of 40 and 65, to refuse to hire, employ, admit or license, or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment;

2. For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination respecting individuals between the ages of 40 and 65, or any intent to make such limitation, specification or discrimination;

3. For any employer, licensing agency or employment agency to discharge or otherwise discriminate against any person because he has opposed any discriminatory practices under this section or because he has made a complaint, testified or assisted in any proceeding under this section.

(c) Nothing in this subsection shall be construed to prevent termination of the employment of any person physically or otherwise unable to perform his duties, nor to affect any retirement policy or system of any employer where such policy or system is not a subterfuge to evade the purposes of this subsection, nor to preclude the varying of insurance coverage according to an employee's age; nor to prevent the exercise of an age distinction with respect to employment of persons in capacities in which the knowledge and experience to be gained might reasonably be expected to aid in the development of capabilities required for future advancement to supervisory, managerial, professional or executive positions.

EMPLOYMENT

Government Contracts—Wisconsin

Chapter 540 (Assembly Bill No. 796), Laws of 1959, of the Wisconsin Legislature, approved October 13, 1959, requires that state contracting agencies include in all contracts a provision (expressly set out in the statute) obligating the contractor not to discriminate against any employee or applicant for employment because of race, religion, color or national origin; and enforcement procedures are provided.

AN ACT to create 15.615 of the statutes, relating to nondiscrimination clauses in contracts entered into by state agencies and granting rule-making powers.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

15.615 of the statutes is created to read:

15.615 NONDISCRIMINATORY CONTRACTS. (1) Contracting agencies of the state shall include in all contracts executed by them a provision obligating the contractor not to discriminate against any employee or applicant for employment because of race, religion, color or national origin.

(2) Contracting agencies of the state shall include the following provision in every contract executed by them:

In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause.

(3) Subsections (1) and (2) shall not apply to contracts to meet special requirements or emergencies, if approved by the director of the fair employment division of the industrial commission.

(4) The contracting agencies of the state shall take appropriate action to revise the standard government contract forms in accordance with this section.

(5) The head of each contracting agency of

the state shall be primarily responsible for obtaining compliance by any contractor with the nondiscrimination provisions prescribed by this section, according to procedures recommended by the fair employment division of the industrial commission. This division shall make recommendations to the contracting agencies for improving and making more effective the nondiscrimination provisions of such contracts. All contracting agencies of the state are directed to co-operate with the fair employment division, and, to the extent permitted by law, to furnish the division such information and assistance as it may require in the performance of its functions under this section. The fair employment division shall establish such rules as may be necessary for the performance of its functions under this section, and shall make annual reports on its progress to the governor.

(6) The fair employment division of the industrial commission may receive complaints of alleged violations of the nondiscrimination provisions of such contracts. Complaints received shall be transmitted by the division to the appropriate contracting agencies to be processed in accordance with the agencies' procedure for handling such complaints. Each contracting agency shall report to the division the action taken with respect to all complaints received by the agency, including those transmitted by the division. The division shall review and analyze the reports submitted to it by the contracting agencies.

(7) When a violation of this section has been determined by the industrial commission following investigation by the fair employment division the state agency shall be so advised and thereafter said state agency shall:

(a) Immediately inform the violating party of the violation.

(b) Direct the violating party to take action necessary to halt the violation.

(c) Direct the violating party to take action necessary to correct, if possible, any injustice to any person adversely affected by the violation.

(d) Direct the violating party to take immediate steps to prevent further violations of this section and to report its corrective action to the state agency involved.

(8) If further violations of this section are committed during the term of the contract the state agency involved may, in its discretion, permit the violating party to complete the contract, after complying with this section, but thereafter request the fair employment division to place the name of the party on the ineligible list for state contracts, or the state agency may terminate the contract without liability for the uncompleted portion or any materials or services purchased or paid for by the contracting party for use in completing the contract.

(9) The names of parties who have had contracts terminated under this section shall be placed on an ineligible list for state contracts, maintained by the fair employment division. No state contract shall be approved and let to any party on such list of ineligible contractors. The

fair employment division may remove the name of any party from the ineligible list of contractors when, following investigation, the fair employment division determines the contractor's employment practices comply with this section and provide adequate safeguards for its observance.

(10) The fair employment division of the industrial commission shall encourage the furtherance of an educational program by employer, labor, civic, educational, religious and other voluntary nongovernmental groups in order to eliminate or reduce the basic causes and costs of discrimination in employment. It may establish and maintain co-operative relationships with agencies of local government, as well as with nongovernmental bodies, to assist in achieving the purposes of this section.

(11) A violation by a prime contractor shall not impute to a subcontractor nor shall a violation by a subcontractor impute to a contractor.

CHURCH PROPERTY

Local Control—Alabama

Act 79 of the Second Special Session, 1959 Alabama legislature, provides for the withdrawal of local churches when parent groups are judicially determined to have "made or sanctioned material changes in the laws, discipline, social creed or jurisdictional system with respect to social standards, practices or policies."

AN ACT To protect and preserve basic trust and fiduciary purposes and interests inherent in the intent and understanding when property in Alabama shall have been subjected or devoted to local church, charitable or educational uses; to prevent impairment of such intent and to preserve the charitable or trust use intended, from subjection to uses, functions or doctrines subversive of such intent or inconsistent with social order, harmony and good will in the administration thereof as a result of or in the event of action by any higher or affiliate church or other authority affecting the administration or use of the property; and to provide for repayment of unsecured loans or grants made by the parent church (or its affiliated organizations) to the local

church as those terms are herein defined; and to provide procedure for protection and preservation of such intent, and the religious, charitable or educational use involved, and for declaratory action to that end.

Be It Enacted by the Legislature of Alabama:

Section 1.

Definitions: As used in this Act, unless the context otherwise requires, the term:

(a) Majority group means sixty-five per centum or more of membership resident in Alabama, enrolled in any local protestant church, not including members who are minors under the age of twenty-one years at the date of filing the bill of complaint or other action herein provided for; or with respect to any

corporation or group organized in Alabama for charitable or educational purposes, "majority group" means sixty-five per centum or more of the adult membership resident in Alabama of any governing or voting board having voting authority in the control or administration of such organization.

(b) Local church means any charge, church, parish or mission of the protestant faith, whether or not incorporated, in any city, town or county in Alabama, which holds title to or a fiduciary or trust interest in property or the income therefrom and which is affiliated with, or recognizes the doctrinal, religious, administrative, jurisdictional, ecclesiastical or other superior authority of a larger denominational or ecclesiastical body of the same faith. The term "local church" shall also include any organization, organized in Alabama, for charitable or educational purposes, having title to or administrative supervision or control (in trust) over property subject to any such higher jurisdiction or authority.

(c) Parent church means the larger denominational or ecclesiastical body or authority having jurisdiction over or affiliated with such local charge, church, parish or mission of the protestant faith, having under the plan of organization of the particular protestant church jurisdiction in the matter or practice of faith, doctrine, membership, ministers, property, social creed or pronouncements, or other organic or administrative function of that protestant church; the designation "Parent Church" being applicable to any such authority whose action or interpretation is made the basis for relief and protection hereunder.

(d) Church property means all property, real, personal or mixed, belonging to or in the possession of the local church (as herein defined) or title to which is vested in the local church or in Trustees for the use and benefit of such local church or a corporation, if the local church is incorporated, whether such use and benefit are expressed in title instruments or not.

(e) Trust clause means any clause or provision inserted in a deed, transfer, will or contract, or which is required by the law or discipline of the parent church to be so inserted, providing that property acquired by the local church or in the name of trustees or a corporation for the use of the local church shall be held in trust for the use and benefit of the parent church, or one or more of its affiliates, ministers, officers

or agents; or a clause in the deed, will, church law or discipline providing substantially as follows:

In trust, that said premises shall be used, kept and maintained as a place of divine worship of the parent church, or as a place of residence for the use and occupancy of ministers of the parent church, subject to the discipline, usage and ministerial appointments of said church as from time to time authorized and declared by the law-making bodies of the parent church.

(f) Withdraw or withdrawal means the voluntary action of the majority group taken or initiated to sever the affiliation, connection or church ties of the local church with or from the parent church as authorized by the provisions of this Act.

(g) Change of social policies means any substantial and material change in or departure from the discipline, social creed, jurisdictional system, authoritative pronouncements or other church law relating to the social standards, practices or policies of the parent church or its affiliated institutions, as the same existed at the time of affiliation or merger of the local church with the parent church, and which change is contrary to the way of life of the majority group.

(h) Affiliated organizations means organizations or boards deriving their powers, functions, funds and property directly from the parent church, as herein defined, or from its law-making body; and does not mean organizations or boards organized under or answerable to any State Conference, Board, Convention or Authority constituting a branch of the parent church.

Section 2. The right and equity are hereby recognized and declared on behalf of the majority group of any local church owning title to or an interest in church property, to preserve and protect the same from impairment or loss, and to prevent church property held subject to the trust clause from being converted to or used for an unintended or different use or purpose, due to a change of social policies of the parent church; and to be relieved of a material miscarriage of intent or understanding, or failure of or departure from the intent or understanding of such local church, or the majority group thereof, with respect to its use of the church property, or the conduct of its traditional social practices due to a change of social policies of the parent church or of any one or more of its affiliated organizations.

Section 3. The majority group of any local church may withdraw from the parent church, and upon withdrawal shall be permitted to devote the church property to the uses originally intended free of the influence of the trust clause, provided the facts upon which the right of withdrawal is conditioned hereunder shall be judicially determined to exist in and by a judicial proceeding as provided for in this Act.

While this act is not intended to control any doctrinal, religious, educational, social or other formula or practice of the parent church, as herein defined, one of its purposes is to afford an effective remedy and procedure for the preservation and protection of trust, charitable, educational or church property from impairment or loss thereof, when the intended trust use thereof is threatened as a proximate result of subsequent action by the parent church inconsistent with the basic intent or assumption inherent in or expressed and fixed before, during or in the acquisition or dedication thereof.

Section 4. Whenever as a result of action of the parent church or any of its authoritative subdivisions, or its law-making body, the majority group of any local church shall determine that there has been a change of social policies, within the meaning hereof, or that any act, declaration, law, policy, social creed or jurisdictional system of the parent church is contrary to the basic intent, understanding or basic assumption existing between the contributors, donors or grantors of the church property and the local church, or between such contributors, grantors or donors and any trustee of property held for the benefit of the local church or held by or for the use of the local church subject to the trust clause; and whenever such majority group shall find and determine that such act, declaration or policy of the parent church is not only contrary to such basic intent, understanding or assumption but that acquiescence therein would be contrary to the welfare of the local church or the peace, order, friendliness or good will within the membership of the local church, or be inconsistent with the effective and harmonious continuation of church work, or involve the church in public controversy, thereupon the majority group shall have the right without sacrifice or loss of any title, interest or matured equity or rights in property, funds or benefits, to set up a local church or unit independent of the authority of the parent church; the local church

or unit so set up shall be in corporate form as may be provided for under the laws of Alabama for the formation of church or non-profit charity corporations.

Section 5. Upon resolution or written declaration by the majority group, and upon giving thirty days' notice to the parent church and upon giving like notice to the congregation or membership or the official governing body of the local church, said corporation so formed by the majority group shall be authorized to institute a suit in equity on behalf of itself and the majority group, at the cost of the complainant if none of the respondents contest the suit (otherwise the costs to be taxed within the discretion of the Court as now provided by law), in the Circuit Court in and for the Circuit in which the local church is located, for a judicial finding and declaratory action as provided herein. Such proceeding or suit shall state the facts as to the basis for relief from miscarriage of basic intent and understanding, as provided in this Act, and any other factors or equities entitling the complainant to the relief sought.

Section 6. Service of process in said suit or proceeding may be had on the local church by service on its administrative authority (one or more senior or representative members of stewards, wardens, deacons or other similar lay authority of the church) and by service on the parent church by serving any representative official, minister or employee thereof, and by service on the trustee or person or corporation in which the record title to the church property sought to be affected by the proceeding is held or vested, and by service on any other respondent having a justiciable interest in the relief sought; service by publication or otherwise as may at the time be provided for under Alabama law may be had on non-resident, and subject to equity rules as to class suits and other methods of service of process.

Section 7. If on final hearing the court shall find that the organization of complainant corporation, subject to such further or amended conditions or provisions as the court may require or approve, is equitable and appropriate for administration as a religious or charitable trust, and that the withdrawal of the church property from subjection to the action complained of is equitable and appropriate under the cy pres doctrine or otherwise, the Court shall enter de-

creed accordingly, declaring the status, rights and equities involved, and, on final compliance, shall decree its approval for the record as well as grant any other relief appropriate in the premises.

Section 8. The complainant in said suit may aver as a separate aspect or equity that the parent church has made or sanctioned material changes in the laws, discipline, social creed or jurisdictional system with respect to social standards, practices or policies, which changes are opposed to the views, beliefs or way of life of the majority group, and which changes are substantially and materially different from the status of the laws, discipline, social creed or jurisdictional system of the parent church with respect to its social standards, practices or policies existing at the time the local church became affiliated or merged with the parent church, and may further aver that such changes, insofar as they negate or depart from said basic intent and understanding of the majority group, are constructively fraudulent, collusive or arbitrary, as those terms are defined or referred to in the law; and upon proof of such averments the complainant shall be entitled to the relief provided by this Act.

Section 9. The bill of complaint in any suit authorized by this Act shall state whether or not the local church obtained from the parent church or any of its affiliated organizations a loan or grant of funds with which to defray in whole or in part the cost of constructing or acquiring

any of the buildings or real estate included in the church property sought to be withdrawn, and if such loan or grant was obtained within twenty years prior to filing the bill, then it shall aver the amount thereof and the date such loan or grant was obtained and whether, if it be a loan, it is secured by a lien instrument. If the court grants the right to withdraw as prayed for in the bill and further grants a confirmation of title to property in the local church, free of the trust clause as herein defined, it shall determine the amount of such unsecured loan or grant and that the same was made within twenty years of the filing of the bill, if that be true, and shall decree that such loan (if unsecured) or grant shall be repaid without interest to the date of the decree, within a reasonable time to be fixed by the court, as a condition to granting the relief sought, and shall fix a lien on the church property of the local church to secure the repayment of said unsecured loan or grant.

Section 10. Nothing in this Act shall be construed to affect the validity of any existing lien or mortgage on the church property or part thereof.

Section 11. If any material provision of this Act should be judicially held to be unconstitutional or otherwise invalid, the remaining provisions hereof shall be treated and observed as valid and binding.

Section 12. All laws and parts of laws in conflict with any of the provisions of this Act shall be and the same are hereby repealed.

CONSTITUTIONAL LAW

State Control of Schools—Alabama

Act 5 (Senate Joint Resolution 1) of the First Special Session, 1959 Alabama legislature, memorializes Congress to call a convention to consider submitting to the state legislatures an amendment to the federal constitution providing for exclusive state control of education systems.

SENATE JOINT RESOLUTION

WHEREAS education since its acceptance as an obligation of government has been considered the exclusive responsibility of the several states, and

WHEREAS, the several states over a period of years have invested great sums of money in establishing systems of public education within their respective boundaries suited to the economic, cultural and social requirements of each of said states, and,

WHEREAS, no system of public education can long survive, which is not responsive to the needs and demands of the people it serves, and

WHEREAS, only those systems of public education maintained, administered and exclusively controlled by the several states they serve, can enjoy the necessary support from the people essential to an atmosphere conducive to the transmission of knowledge to young students, and

WHEREAS, the Federal Government is now engaged in extending its regulatory powers into the field of public education in the several states, and

WHEREAS, there is grave danger of this extension of the power of the Federal Government resulting in a system of national public education dedicated to the requirements of a super government, rather than to the needs of the several states; now, therefore

BE IT RESOLVED by the Senate, the House of Representatives concurring, that the Legislature of Alabama, as provided in Article V of the Constitution of the United States of America, does hereby make application to and memorialize the Congress of the United States of America

to call a convention to consider submitting to the Legislatures of the several states an amendment to the Constitution of the United States of America in substantially the following form:

"The several states shall have the power to establish, maintain and exclusively control a system of public education within their respective boundaries consistent with the economic, cultural and social needs of each of the several states."

BE IT FURTHER RESOLVED, that copies of this Resolution be transmitted by the Secretary of State to the Clerk of the House of Representatives of the United States of America, to the Secretary of the Senate of the United States of America, and to each member of the Alabama delegation to the Congress of the United States of America to be filed and presented by said delegation to the Congress of the United States of America.

BE IT FURTHER RESOLVED, that the Legislature of Alabama does hereby respectfully request the Legislatures of the several states of the United States of America to join in presenting similar applications to the Congress of the United States of America.

COUNTIES

Surveillance—Alabama

Act 17 (House Joint Resolution 14) of the First Special Session, 1959 Alabama legislature, provides for a "standby committee" to study conditions in Macon and contiguous counties. Macon county is the site of Tuskegee Institute and, along with other counties, was the subject of an investigation by the United States Civil Rights Commission. 4 Race Rel. L. Rep. 200. (See also 3 Race Rel. L. Rep. 357, 1220).

Be it resolved by the Legislature of Alabama, both Houses thereof concurring:

1. The representatives from the counties of Bullock, Elmore, Lee, Macon, Montgomery, Russell, and Tallapoosa, and the senators from the tenth, twenty-sixth, twenty-seventh, and twenty-eighth senatorial districts, are hereby constituted a special joint continuing committee, to be known as the "Macon County Standby Committee," who shall have the duty and responsibility of continuing to study conditions

in Macon and contiguous counties particularly, and in the State as a whole generally, for the purpose of keeping current information on problems relating to Macon County, and making recommendations from time to time on legislation needed to meet any changing conditions or emergencies that may arise in Macon County. The committee shall report at least once each year to the Legislative Council.

2. The senator from the twenty-sixth senatorial district shall serve as chairman of the com-

mittee, and a vice chairman shall be selected by the committee from among their number.

3. Meetings of the committee shall be held at such times and in such places as the chairman or a majority of the committee may designate.

4. The committee shall utilize the Legislative Reference Service as committee clerk but may also employ such other technical and clerical personnel as may be necessary.

5. Committee members shall be entitled to their usual legislative per diem and expenses for each day they attend a committee meeting, or are otherwise engaged on committee business. The per diem and expenses of members, the compensation and expenses of personnel employed by the committee, and the other expenses incurred by the committee in the performance of its function, shall be paid from appropriations made for the payment of expenses of the Legislature, on vouchers approved by the committee chairman.

ELECTION

Registration—Alabama

Act 577 of the Regular Session, 1959 Alabama Legislature, allows registrars to devote certain required meeting dates exclusively to clerical work.

AN ACT, To authorize any county board of registrars which is not furnished clerical assistance to reserve certain meeting days for the performance of such necessary clerical work as may be required of the board in connection with the discharge of its duties.

Be it enacted by the Legislature of Alabama:

Section 1. Any county board of registrars which is not furnished clerical assistance may, in its discretion, after public notice has been given, decline to receive applications for registration on any day it meets, which day it reserves for the purpose of performing necessary clerical work, provided that not more than twelve days may be reserved for clerical work in any calendar year.

Section 2. All laws or parts of laws which conflict with this Act are repealed.

Section 3. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

ELECTIONS

Registration—Alabama

Act 579 of the Regular Session, 1959 Alabama Legislature, amends the registration procedure of the Code of Alabama so as to permit registration in even-numbered years in the discretion of the board of registrars. The material reproduced in italics below was added by the new Act:

AN ACT to amend further Section 26 of Title 17, Code of Alabama (1940), which relates to meetings of county boards of registrars.

Be it enacted by the Legislature of Alabama:

Section 1. Section 26 of Title 17, Code of Alabama (1940), as amended, is amended further to read as follows:

"Section 26. The board of registrars in

each county shall visit each precinct at least once and oftener if necessary between October first and December thirty-first, 1939, and each two years thereafter, to make a complete registration of all persons entitled to register, and shall remain there at least one half a day. They shall give at least twenty days notice of the time when, and the place in the precinct where they will attend to register applicants for registration, by bills posted at three or more public places in each election precinct, and by advertisement once a week for three successive weeks in a newspaper, if there be one published in the county. Upon failure to give such notice or to attend any appointment made by them in any precinct, they shall, after like notice, fill new appointments therein. The time consumed by the board in completing such registration shall not exceed thirty working days in any county, except that in counties having more than three hundred thousand population as

shown by the last preceding census, the time shall not exceed seventy-five working days. The board of registrars in each county shall meet at the courthouse on the third Monday in January, 1940, and each two years thereafter and shall remain in session ten working days for the registration of voters. *During even numbered years, the board of registrars in each county, in its discretion, may visit any of the precincts of the county on such days as the board shall determine for the registration of voters; but the time consumed in such registration of voters shall not exceed a total of twenty working days in any one calendar year. In the manner prescribed herein, the board shall give notice of the time when, and the place in the precinct where, they will attend to register applicants for registration.*

Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

GOVERNMENTAL FACILITIES

Swimming Pools—Florida

After a verbal opinion by the Miami, Florida, city attorney that the city had no legal basis upon which to deprive Negroes of the use of public facilities, the city manager issued a verbal order to open the city's swimming pools and parks to Negroes. On the day following, October 28, 1959, the city commission took formal action by adopting Resolution No. 31329, set forth below, instructing the city manager to countermand his directive authorizing the admission of Negroes into public pools.

RESOLUTION NO. 31329

A RESOLUTION instructing the city manager to countermand a directive of October 27, 1959 authorizing the admission of Negroes into all public swimming pools in the City of Miami.

WHEREAS, the City of Miami has provided seven (7) public swimming pools for the benefit and use of its citizens; and

WHEREAS, there are not now nor have there ever been any ordinances, resolutions or regulations adopted by the Commission of the City of

Miami restricting the use of public swimming pools in Miami on a race-segregated basis; and

WHEREAS, all public swimming pools in the City of Miami are provided with sanitary and washroom facilities for the separate use of males and females without regard to separation of races; and

WHEREAS, Section 514.02, Florida Statutes, delegates the supervision of sanitation, healthfulness and cleanliness of swimming pools, bathhouses, public swimming and bathing places and all related appurtenances, to the State Board of Health; and

WHEREAS, Section 514.02, Florida Statutes, also delegates unto the State Board of Health the authority to make and enforce rules and regulations pertaining to the use of such facilities as it shall deem proper; and

WHEREAS, the State Board of Health in regulating the use of said facilities did impose a regulation restricting the use of the same sanitary and washroom facilities by people of the white and negro races, which regulation is presently in force and effect and which regulation is a restrictive law of the State of Florida; and

WHEREAS, to permit people of the negro race the use of sanitary and washroom facilities provided at public swimming pools would be authorizing and sanctioning the violation of Florida Law; and

WHEREAS, the City of Miami can under no circumstances countenance nor can it be a party to an undertaking that would result in the violation of a valid law of the State of Florida; and

WHEREAS, to permit people of the Negro race the use of public swimming pools in Miami and deny them the use of sanitary and washroom

facilities would result in a condition opposed to public health, welfare and morals and would be a travesty on justice; and

WHEREAS, in view of the obvious conflict occasioned by the above express conditions the Commission of the City of Miami is faced with the inescapable conclusion that it cannot in good conscience approve the action of the City Manager in his decision to open all public swimming pools in Miami to negroes and in fact the Commission deems it to be in the best interests of the public to instruct the City Manager to countermand his order to open all public swimming pools in Miami until such conflict is resolved and the problems occasioned thereby properly disposed of;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY OF MIAMI, FLORIDA:

Section 1. That the City Manager is hereby instructed to countermand his directive of October 27, 1959 authorizing the admission of negroes into all public swimming pools in the City of Miami.

PASSED AND ADOPTED this 28th day of October 1959.

ADMINISTRATIVE AGENCIES

EMPLOYMENT

Fair Employment Laws—Michigan

In re ESTATE OF William R. RAGLAND, by Charles L. Smith, General Administrator, Claimant v. **CITY OF DETROIT**, Board of Water Commissioners, Department of Water Supply, Sewage Treatment Plant, and Detroit Civil Service Commission, Respondent.

Michigan Fair Employment Practices Commission, September 16, 1959, Claim No. 287.

SUMMARY: A Negro man filed a complaint with the Michigan Fair Employment Practices Commission (FEPC) against his former employer, the Detroit Department of Water Supply, asserting that, contrary to provisions of the state fair employment act, he had been discharged in retaliation for having previously filed a complaint with the FEPC alleging discrimination by his employer in maintaining racially segregated locker assignments, though the stated reasons for his discharge were "poor attendance, poor work performance and for the good of the service." In a motion to dismiss it was insisted that the FEPC was without jurisdiction because an appeal taken by claimant (now deceased) before the city civil service commission had already resulted in an order by that body upholding the discharge for the reasons stated upon a finding that it had not been in retaliation for filing the previous FEPC complaint. However, the motion was rejected by the FEPC, which held that it has primary and exclusive jurisdiction over charges of discrimination in employment and that "the rights and actions of municipalities must give way to the rights and actions of the FEPC in this field." After a public hearing, the FEPC (holding itself not bound by findings of the civil service commission) found that claimant's absence records and service ratings throughout his employment tenure indicated satisfactory work performance, while other evidence indicated that his employer had discriminated against him in retaliation for his original complaint before the commission. Notice being taken of a state circuit court order that claimant's complaints before the FEPC survived his death, the commission ordered that he be reinstated and that his estate be paid wages, benefits, and other compensation to which he would have been entitled between the dates of his discharge and his death. The employer was also ordered to notify all employees in writing that they might avail themselves of FEPC services without retaliation from the employer. The commission's opinion, findings of facts and conclusions of law, and order are reprinted below. [Note: A Michigan FEPC press release states: "Out of more than 850 cases in nearly four years of operation this is the second Public Hearing held by the FEP Commission and the first in which the Commission issued an order."]

Pursuant to the statutes in such case made and provided, and the rules and regulations of the Fair Employment Practices Commission, a public hearing was held on the above claim. The Commission having read the transcript and considered the evidence and considered the record as a whole, finds the following facts and conclusions of law:

FINDINGS OF FACT

1. William R. Ragland commenced employment with the Department of Water Supply on August 20, 1953, and remained in such employment until January 3, 1957, when he was given notice of discharge, effective January 13th, by the Department of Water Supply.

2. On November 18, 1957, William R. Ragland died and the Estate of William R. Ragland, by Charles L. Smith, General Administrator, was substituted as the claimant.

3. During Ragland's tenure of employment he was absent: for personal reasons—19 days; normal sick leave—29 days; family sickness—2 days; reserve sick leave—10 days; injury sick—7 days; and had 20 days of partial absence.

4. Throughout the tenure of Ragland's employment his attendance, work performance and attitude were satisfactory within the standards used by the Department of Water Supply.

5. Many employees of Sewage Disposal Plant have absences greater than the average for all absence categories and a number of employees exceeded Ragland's absences in individual categories and in total absences as well.

6. The category of partial days absence apparently refers not only to portions of days absent but also to tardiness.

7. The Department of Water Supply did not take discharge or other disciplinary action against Ragland's fellow employees with comparable or greater absences. Ragland's absence record was not considered bad enough to warrant discharge prior to his filing Claim No. 189.

8. Ragland filed Claim No. 189 on July 9, 1956, charging the Department of Water Supply with maintaining racially segregated locker assignments. Claim No. 189 was under conciliation proceedings between the FEPC and the Department of Water Supply.

9. Ragland was under civil service with the City of Detroit and civil service ratings in accordance with the rules and regulations of the Detroit Civil Service Commission were made by Ragland's superiors which show that the first rating is February 28, 1954, when he was given a rating of 91%; on August 31, 1954, he was given a rating of 91%; on February 28, 1955, he was given a rating of 90%; on August 31, 1955, he was given a rating of 91%; and his last rating on August 31, 1956, he was given a rating of 80.5%; that such ratings indicated that his attendance record, work performance and attitude were satisfactory.

10. After filing Claim No. 189 Ragland's service rating dropped from 91% to 80.5%.

11. The Sewage Treatment Plant officials were disturbed about Claim 189 and attendant publicity so that comments were made about the same in Plant Superintendent Burley's diary.

12. Respondent's attitude toward Ragland

changed after the filing of Claim No. 189 on July 9, 1956.

13. On August 3, 1956, less than one month after the filing of Claim 189, Ragland was assigned to janitorial duties out of classification for a period of thirty days to clean up the locker room about which he had complained; that he was given other jobs not suitable to his condition because of injuries and health, and that after complaint by Ragland such jobs were changed.

14. After Ragland's filing of Claim 189 Superintendent Burley instructed his supervisory staff to "watch Ragland".

15. On December 31, 1956, Ragland was given a ten-day notice of suspension preliminary to discharge by the Water Department, and the reasons given for such suspension are "poor attendance, poor work performance and for the good of the service"; on January 3, 1957, Ragland was served with notice of discharge, effective January 13th, based upon the same grounds set forth in his suspension notice.

16. On January 4, 1957, Ragland filed Complaint No. 287 with the FEPC, charging that he was discharged in retaliation for having filed Claim No. 189.

17. Within the time provided by the rules of the Detroit Civil Service Commission Ragland filed a Claim of Appeal with said Commission from his discharge and a hearing was had before the Commission on January 29, 1957; that at said hearing Ragland was present and was also represented by the business agent of the Michigan Sewage Treatment Employees Health and Welfare Association; that testimony was taken by the Commission of employees of Respondent and of William Ragland; that at such hearing Ragland claimed that he was discharged in retaliation for having filed Claim 189 and that he was not guilty of the claim of excessive absenteeism and tardiness and poor work record.

18. On February 26, 1957, the Detroit Civil Service Commission filed its opinion and order upholding Ragland's discharge for excessive absenteeism, tardiness and below work performance and also held that Ragland's claim of retaliatory discharge was unsubstantiated and that there was no evidence that the Board of Water Commissioners acted in other than good faith and that the reasons set forth in his discharge are other than the real reasons.

19. On December 12, 1956, Mr. Burley, Engineer of Sewage Treatment, prepared a list of

incidents concerning Ragland, his attendance, work record, absences and other matters, covering the period of his employment from August 26, 1953, to December 11, 1956, with an addenda from December 21 to December 27, 1956; that this list was sent by Mr. Burley to Mr. Gerald Remus, General Manager, and a copy to Mr. E. N. Rasinen, Personnel Manager, and this list was prepared as justification for Ragland's discharge; that on January 28, 1957, a list entitled "Notes on William Ragland, Supplementary to Mr. Burley's letter of 12-12-56" was prepared by J. H. Engel, Ragland's immediate supervisor; that these documents were used as justification and in connection with Ragland's discharge and the hearing before the Detroit Civil Service Commission.

20. Sewage Plant Officials and Personnel Officials of the Department of Water Supply did not share with the Board of Water Commissioners or the Detroit Civil Service Commission the complete history of absence toleration at the Sewage Treatment Plant; Ragland's satisfactory work performance; the poorer attendance records of other employees; or the changed attitude toward Ragland by Sewage Plant supervision.

21. By order of the Wayne Circuit Court, by the Hon. Victor J. Baum, Circuit Judge, Complaints 189 and 287 survive William R. Ragland's death.

CONCLUSIONS OF LAW

1. The Fair Employment Practices Commission has primary jurisdiction over charges of discrimination in employment and had primary jurisdiction of Claim 287, filed by William R. Ragland.

2. That the FEPC is not bound by the findings of the Detroit Civil Service Commission that Ragland's discharge was not retaliatory for having filed Claim 189.

3. That the Motion to Dismiss by Respondent is without merit and should be dismissed.

4. That within the standards used by the Department of Water Supply William R. Ragland was a satisfactory employee during his term of employment.

5. That the Respondent, City of Detroit, Department of Water Supply, discriminated against William R. Ragland by discharging him for bringing charges against the Respondent in Claim No. 189.

6. That William R. Ragland should be re-in-

stated in his employment with the Respondent from January 2, 1957, to November 18, 1957, the date of his death.

7. That the Estate of William R. Ragland be paid such wages, benefits and other compensation to which William R. Ragland would have been entitled from January 2, 1957, until November 18, 1957.

OPINION

This proceeding arises out of a claim filed by William R. Ragland against the Department of Water Supply, City of Detroit, Sewage Disposal Plant, under Section 3(f) of Act 251 of the Public Acts of 1955, (Sec. 17.458, Mich. Stat. Annot.), known as the Michigan State Fair Employment Act. This is a claim of unlawful retaliatory discharge for having filed a complaint against the employer alleging discrimination.

After having filed a complaint, and during the course of the proceedings, on November 18, 1957, complainant Ragland died. Upon the opening of this hearing the proceeding was amended by substituting the Estate of William R. Ragland, by Charles L. Smith, Administrator, as Claimant, and the respondent was amended to read City of Detroit, Board of Water Commissioners, Department of Water Supply, Sewage Treatment Plant, and the Detroit Civil Service Commission. Hereafter, claimant will be referred to as Ragland.

Ragland commenced employment with respondent on August 20, 1953, as a sewage plant helper. On March 15, 1954, he was promoted to mechanical helper. On July 9, 1956, he filed a complaint with the Fair Employment Practices Commission, hereinafter called FEPC, being Complaint No. 189, alleging discrimination on the part of the respondent Water Board in the assignment of lockers at the sewage treatment plant. This complaint was the subject of conciliation meetings and negotiations between the FEPC and the respondent.

[Suspension and Discharge]

On December 31, 1956, Ragland was given a ten day notice of suspension beginning January 2, 1957, pending determination by the Board of Water Commissioners as to his discharge. The reasons given for suspension are "poor attendance, poor work performance and for the good of the service." On January 3, 1957, Ragland was served with notice of discharge, effective January 13th, based upon the grounds set forth in the

suspension notice. On January 4, 1957, Ragland filed the instant claim, No. 287, alleging in substance that he had been discharged in retaliation for having filed Claim No. 189.

After filing his claim with the FEPC and within the time provided by the rules of the Detroit Civil Service Commission, Ragland filed an appeal from his discharge with the Civil Service Commission. This appeal came on for hearing before the Commission on January 29th. Testimony was taken at this hearing, during the course of which Ragland claimed that subsequent to his filing Claim No. 189 with the FEPC his supervisors and superiors commenced a course of discriminatory work assignments, finally discharging him for an occurrence in his work not his fault and that the claim of excessive absenteeism, tardiness and low work standard are but excuses to cover retaliation for filing a claim with the FEPC.

On February 26, 1957, the Detroit Civil Service Commission filed its opinion and order upholding Ragland's discharge for excessive absenteeism, tardiness and below work performance. The Commission also held that Ragland's claim that his discharge was caused by filing a complaint with the FEPC was unsubstantiated and further, "the Commission found there was no evidence that the Board of Water Commissioners acted in other than good faith and that the reasons set forth in this discharge are other than the real reasons."

[Circuit Court Suit]

While Ragland's discharge by the Water Board received swift confirmation from the Detroit Civil Service Commission, his complaint with the FEPC that his discharge was retaliatory discrimination commenced its long trail of investigation and conciliation as required by the Fair Employment Practices law. During its course suit was commenced by the FEPC in the Circuit Court for subpoena duces tecum to compel respondents to submit records for inspection by the Commission's representatives. As heretofore noted, during these proceedings Ragland died. Respondent claimed that Ragland's death abated the proceedings. After a hearing before the Hon. Victor J. Baum, Circuit Judge, an order was entered that Complaints 189 and 287 survived Ragland's death and a stipulation was entered into between counsel for the parties providing for inspection of the records of the employees of the Sewage Treatment Plant.

After investigation of respondent's records attempts to resolve the complaints by conciliation were made. Numerous conciliation meetings were held by representatives of the parties. All efforts at conciliation failing, the Commission ordered a public hearing. This hearing was extensive—over a period of five days, and considerable testimony was taken and argument had. In addition to the matters hereinbefore set forth, the following facts were adduced at the hearing:

[Facts Adduced at Hearing]

Ragland, during his period of employment, had an absence and tardiness record as follows: Absent—19 days; 20 partial days absence; 29 days of normal sick leave; absent for family sickness on 2 days; he was granted a reserve sick leave for 10 days and had 7 days of absence because of an injury. In addition, Ragland's file contained memoranda indicating requests for permission to tap sick leave reserve, which was approved, and medical certificates showing illness and injury causing absence, which was approved.

Other employees during this period of time also had comparable periods of absence and tardiness. For example; Oliver Byrdsong had 17 days absence; 12 partial days absence; 15 days sick leave, 8½ days absence because of family sickness. Luther Anderson had 32 days absence for personal business; 3 partial days absence; 25 days sickness, 7 days off for family sickness and had tapped his reserve sick leave to the extent of 37 days. Maceo Cunningham was off the payroll for personal business 37 days; 1 partial day absence; 19 days regular sick leave and 8 days for family sickness. Willie B. McCord had 46 days absence for personal business; 1 partial day absence; 29 days of regular sick leave; 7 days of reserve sick leave, and 90 days leave of absence for extended illness. Calvin Holcomb had 33 days absence for personal reasons; 3 partial days absence; 31 days sick leave; 12 days reserve sick leave. Apparently the term "partial absences" referred to tardiness.

There were numerous other cases of like tenor and a summary of the statistics of the employees during the term of Ragland's employment concerning absences, partial absences, sick leave and total time away from the job regardless of reason, made by the field representatives of the Commission, discloses that on days off of payroll above the average of 3.3, four employees had more days off than Ragland; of partial absences

higher than the average of 3.9, four employees were higher than Ragland; of employees having a greater amount of sick time off (sick leave, family sick and reserve sick all included), higher than the average of 19.4 days, ten employees had more time off than Ragland; of total time away from the job regardless of reason, six employees had more total days off than Ragland.

[Dossier on Claimant Prepared]

On December 12, 1956, prior to Ragland's discharge, Mr. Burley, Engineer of Sewage Treatment, prepared a list of incidents concerning Ragland, his attendance, work record, absences and other matters, covering the period of his employment from August 26, 1953, to December 11, 1956, with an addenda from December 21 to December 27, 1956. This dossier, entered as Exhibit 7 at the hearing, was sent by Burley to Mr. Gerald Remus, general manager, with a copy to Mr. E. M. Rasinen, personnel manager. This dossier was prepared as justification for Ragland's discharge. To back this up by statements from Ragland's immediate supervisor, J. H. Engel on 1-28-57 prepared what is described as "Notes on Wm. Ragland Supplementary to Mr. Burley's letter of 12-12-56." This list is Exhibit 6. This is the same J. H. Engel who made civil service evaluations on Ragland as hereafter set forth.

Ragland was under civil service and in compliance with the requirements of the Civil Service Commission for evaluation records. Respondent maintained periodic evaluations of Ragland. The first such rating is February 28, 1954, and was made by two of his supervisors, J. Pessino and H. Dickson. The rating given to Ragland was 91%; on August 31, 1954, he was rated by J. Pessino and J. H. Engel and given a rating of 91%; On February 28, 1955, report by Pessino and Engel and rated at 90%; on February 28, 1955, rated by Pessino and Engel and rated at 90%; on August 31, 1955, rated by B. Sontag and Engel and given a rating of 91%; the last rating is August 31, 1956, after he had filed his complaint No. 189 with the FEPC. This rating was made by Pessino and Engel and he is given a rating of 80.5%.

All of the rating cards with the various boxes relating to Ragland's character, work efficiency, etc., were presented to Ragland for his signature and were all signed by him.

[Jurisdictional Question]

At the outset we are met with a jurisdictional question. Respondent, by motion to dismiss filed prior to taking of testimony and by renewal upon conclusion of proofs, insists that Ragland's discharge having been upheld by the Detroit Civil Service Commission after a hearing, and no appeal having been taken from its ruling, its decision is final and the FEPC has no right to consider this claim; that the claimant's sole remedy is review by certiorari in the courts. Counsel for respondent cites *Dyson vs. City of Detroit*, 333 Mich. 116, *Sewell vs. Electrical Contractors, etc.*, 345 Mich. 93 and *Welfare Commission vs. Civil Service Commission*, 289 Mich. 101. These cases are not in point. The *Dyson* case merely holds that a bill of complaint in equity is not proper to review the order of a municipal civil service commission, certiorari being the appropriate remedy. The *Sewell* case is an action for damages alleging a conspiracy to cause defendant's discharge as a building inspector with the City of Detroit. *Sewell* had a hearing before the Detroit Civil Service Commission and his discharge was affirmed. An application for certiorari to the Wayne Circuit Court was denied. Thereafter, he was granted a rehearing by the Civil Service Commission and his discharge was reaffirmed. He again appealed by certiorari and this appeal was dismissed because he failed to furnish the court with a transcript of the testimony taken at the rehearing. The Supreme Court held that the result of this dismissal was to leave the cause as though no appeal had been taken and the order of the commission was final as though no appellate proceeding was instituted. In the *Welfare Commission* case, G. R. Harris was discharged as superintendent of the Welfare Commission. His discharge was not sustained by the Civil Service Commission and he was reinstated in his position. On appeal by the Welfare Commission the Supreme Court held there was substantial evidence to uphold the Civil Service Commission and affirmed the reinstatement.

[State Public Policy]

The public policy of Michigan toward discrimination in employment is expressed by the legislature in Act 251 of the Public Acts of 1955 (Mich. Stat. Annot. Sec. 17.458) known as the "Michigan State Fair Employment Practices Act." The title to the law reads:

"An Act to promote and protect the welfare of the people of this state by prevention and elimination of discriminatory employment practices and policies based upon race, color, religion, national origin or ancestry;"

Public policy is further expressed in Sections 1 and 10 the Act as follows:

"Sec. 1. The opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry is hereby recognized as and declared to be a civil right.

Sec. 10. (a) The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provision hereof shall not apply.

Nothing contained in this act shall be deemed to repeal any of the provisions of any law of this state relating to discrimination because of race, color, religion, national origin or ancestry."

Employer includes the state or any political or civil subdivision thereof. Sec. 2(b). The City of Detroit is a political subdivision of the state operating under a home rule charter, under which the Detroit Civil Service Commission was created. Although the Commission may set the conditions for hiring and firing, it may not do so in contravention of the general law of the State. *Northrup vs. City of Jackson*, 274 Mich. 20. It is clear that under the fair employment practices law, the FEPC has exclusive jurisdiction over complaints of discriminatory employment practices, and the rights and actions of municipalities must give way to the rights and actions of the FEPC in this field.

Another matter militates against the respondent's position. Ragland was discharged on January 3, 1957, and promptly on January 4th he filed his claim of retaliation with the FEPC. Only later did he file his claim of appeal with the Civil Service Commission. The FEPC therefore first acquired jurisdiction and the Civil Service Commission should have given way.

For the foregoing reasons we hold that the FEPC had exclusive jurisdiction to determine Ragland's complaint and the FEPC is not bound by the Civil Service Commission's finding that "there was no evidence that the Board of Water Commissioners acted in other than good faith

and that the reasons set forth in this discharge are other than the real reasons." The motion to dismiss is denied.

[Was Discharge Retaliatory?]

This brings us to the factual question in the case, was Ragland's discharge in retaliation for filing Claim No. 189 and therefore discriminatory? The instant complaint was filed under Section 3(f) which reads:

"Sec. 3. It shall be an unfair employment practice:

(f) For any employer, employment agency or labor organization to discriminate in any manner against any person because he has opposed or supported any practice forbidden by this act, or because he has made a charge, testifies, assisted or participated in any manner in any investigation, proceeding or hearing under this act."

This provision is not only necessary for the enforcement of the law, but is also for the protection of the individual complaining or assisting in the activity of the FEPC, and must be enforced to effectuate the will of the people in eliminating discrimination in employment. Without it, by threat of the loss of his job or other retaliatory action against him either financially or in the conditions of employment, employees could be cowed and coerced into keeping silent and make no attempt to remedy discriminatory conditions.

On the question involved, counsel for respondent clearly states the issue thus: "Has the Fair Employment Practices Commission established on the record considered as a whole a preponderance of evidence that the respondent engaged in an unfair employment practice in discharging Mr. William C. Ragland." He then contends that to so find we must disbelieve the sworn testimony of John Pessina, a supervisor at the Sewage Treatment Plant, Mr. Burley, the superintendent, and entirely discount the investigation of Mr. Rasinen, the personnel officer, and Mr. Remus, general manager of the Department of Water Supply, and in addition, that the Board of Water Commissioners were "completely taken in" by the personnel and officials of the Department of Water Supply and the members of the Civil Service Commission missed the point or fell victim of a foul conspiracy to violate the Fair Employment Practices Act (and the charter

of the City of Detroit as well) in upholding the discharge."

It is not necessary to so find. It is unquestioned that the members of both commissions acted in good faith on the basis of the material they had before them. The Board of Water Commissioners had before them only the statements of its supervisory personnel. Ragland had no opportunity to tell his story and the Board acted routinely on a recommendation made to them. The Civil Service Commission acted on the basis of the record before it. Ragland was not represented by an attorney. He was represented by the business agent of the Michigan Sewage Treatment Employees Health and Welfare Association. He did not have access to the attendance records, the Civil Service rating cards, and the other exhibits presented at this hearing. In fact, he could not have gotten them, since the FEPC had to resort to court proceedings to obtain them.

[Discrimination Revealed in Conduct]

As to the testimony of the witnesses presented by respondent, men do not often proclaim their prejudices and retaliatory intentions openly. These must be garnered from their conduct. The New York Court of Appeals well stated the situation in *Holland vs. Edwards*, 317 N. Y. 38, when it said:

"One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct . . . play no small part.' (Cf. *Labor Bd. vs. Express Pub. Co.*, 312 U.S. 426, 427)."

Ragland was allegedly discharged because of excessive absenteeism, tardiness and below work record. With reference to absenteeism, the record shows that many other employees had absence records as bad as Ragland's; that of 28 employees with absences over the average of 3.3 days, four employees had more days off than Ragland. Of 35 employees having more partial days absence than the average of 3.9, four were higher than Ragland. Of all of the employees having a greater amount of sick time off than the average of 19.4 days, ten were higher than Ragland. Of total time off regardless of reason, six employees had more time off than Ragland. There is no

showing that disciplinary proceedings were taken against them. In fact, prior to his discharge very little disciplinary action for absenteeism was taken against Ragland.

[Claimant's Work Record]

With reference to his work record, it is claimed that it was bad from August, 1954, to the time of his discharge. Mr. Burley testified that he and Rasinen had under discussion Ragland's discharge sometime in the latter part of May or early June, 1956, and that Ragland's work record was gone over. The following colloquy took place:

THE COMMISSIONER: And in that discussion was Mr. Ragland's work record gone over?

A. Yes, that was part of the thing that I had to evaluate, among other things.

THE COMMISSIONER: Was it a bad one at that time?

A. Well, it was bad enough that we were considering the possibility of discharging him. It was a question in my mind of whether by talking to Ragland we could do something with him or whether it was a hopeless case.

* * *

THE COMMISSIONER: But between the latter part of May or first part of June when you had his discharge under consideration, up to the time that he had filed this complaint, the first complaint with the Commission in July, you had not called Ragland in to discuss the matter with him?

A. No, sir, I was evaluating his shortcomings in my own mind, and I hadn't—

[Complaint Disturbed Company Officials]

That the Sewage Treatment Plant officials were disturbed by Ragland's complaint No. 189 is clearly indicated by Burley's diary. On December 18, 1956, there is an item entitled "Locker Room and FEPC." This entry reads:

"Remus called to state this was not settled as yet. The colored papers and FEPC still hounding. Ragland stated that no one had to work here if the supervision does not care why should the colored employees. . . . Remus said, 'After men about working.' Ragland history to be sent in. I had it typed this afternoon."

* * *

Q. Now, when you say "Ragland history to be sent in, I had it typed this afternoon," what are you referring to?

A. I am referring to those notes that were dated December 12th, I believe, and that are introduced here as an exhibit.

THE COMMISSIONER: Exhibit 6.

Q. (By Mr. White, continuing): Now, December 19th, 1956, you have:

"S. T. with Larson and Engel. Watch Ragland."

A. That's right.

Q. What does that mean?

A. That S. T. means staff, as referring to members of my staff. That particular paragraph occurs on nearly every page, and with Larson and Engel, I expected them to watch Ragland, meaning his work.

Q. And you had alerted them to pay specific attention to Mr. Ragland on the premises, is that right, as of that date, is that right?

A. That's right.

Also, as indicating respondent's attitude to Ragland was the testimony that on August 3, 1956, after Ragland made his first complaint, he was assigned out of classification for thirty days to janitor work consisting of cleaning the locker room at the rack and grit room. Again, he was assigned to a job to which he protested because of his health, and he was subsequently taken off of it and placed on another job.

[Civil Service Ratings]

As stated, Ragland was under civil service and from February, 1953, to the rating on August 31, 1955, he had received ratings of 90% to 91%. It is significant that his last rating on August 31, 1956, after he had filed his complaint 189 with the FEPC, dropped sharply to 80.5%. In rating him his supervisors marked the boxes that Ragland was "fairly energetic, mentally alert, keeps work up to date, *takes proper interest in work*, neat and orderly, accepts responsibility, a good team worker, pleasant and agreeable, *seldom complains without cause, seldom indulges in needless talk*, suitable training for work, good memory for details, fairly accurate, handles own work satisfactorily, *seldom absent for personal reasons, habits acceptable*, cool-headed, uses good judgment, loyalty to department unquestioned, outstanding self-control, dress always appropriate to work, very versatile, *never late without good cause*, very self-reliant." (Italics sup-

plied). It is impossible to reconcile these ratings with Engel's notes on William Ragland, Exhibit 6, in which he says, "August, 1954, start of poor attendance record and decidedly downgrade work attitude. February 12, 1955, Due to poor attendance record was not considered for promotion to S.P.A. January, 1956, became accident prone. August, 1954, to December, 1956, General attitude toward work poor. When assigned to 6th floor and bottom hoppers, spent considerable time talking with other men on shift and on maintenance, looking out of windows, and sitting on bench; and spent too much time on 4th floor under guise of getting drinking water. Was sent home for this at 9:30 a.m. on March 28, 1956"; or with Mr. Burley's long dossier to Mr. Remus, dated December 12, 1956.

Respondent characterizes these ratings as follows: "Respondent has offered in explanation of these facts the *truth*. The truth may not speak very eloquently and involved therein are serious admissions against the respondent's interests.

"The record discloses that the system of merit rating used by the City, one considered by experts to be the perfect solution for personnel discipline and incentive, is of doubtful value. Those persons who marked Mr. Ragland had admitted their own deficiencies."

[Ratings' Accuracy Questioned]

These service ratings were presented to Ragland for his signature. Respondent insists that these ratings were not correct or accurate evaluations of Ragland. If they were not, then these ratings are sheer hypocrisy and are little less than a fraud upon Ragland, since he is led to believe that they are accurate. Respondent seeks to avoid the effect of these ratings by saying that the Water Board officials and Civil Service Commission pay no attention to them and that they have little or no value so far as accurately determining an employee's rating. This is hardly conducive to efficiency in public work or to public morals, and this Commission must take the position that the Civil Service Commission is acting properly and in good faith and that these ratings are required and should be made as an honest expression of a superior's evaluation of an employee.

Respondent insists that we should judge this matter by the evaluations set forth in Exhibits 6 and 7, the interdepartment memo from Burley to Remus, and the notes on William Ragland,

supplementary to Mr. Burley's letter of 12-12-56, made by J. H. Engel on 1-28-57. The use of this material is aptly characterized by Mr. Justice Smith in *Groehn vs. Corporation and Securities Commission*, 350 Mich. 250, at Pages 266 and 267. In a somewhat similar situation as in the instant case, Mr. Justice Smith said:

"This, of course, leads directly to the doctrine of *ex post facto*. Let there be no misunderstanding concerning its application or the standard-of-ethics problem presented. It is to be hoped by all that the passage of time will see a continuous progressive evolution in our standards of morality, of conduct, and of performance of duty, in all of those tangibles going to make up what we call 'ethics,' 'proprieties,' or 'public policy.' (*Skutt vs. City of Grand Rapids*, supra). There can be no question but that successive public officials have the power to impose ever-higher standards upon the agencies committed to their charge. But that is not the problem in the case before us. . . . Our problem is more basic, more elementary. It is this: Can a man be punished today for actions of yesterday that were neither dishonest nor fraudulent nor disobedient at that time? We say not. If his actions were wrong yesterday he can be punished today. If they are wrong today he can be punished today or tomorrow. But he cannot be punished today because yesterday's actions (complying with the then-applicable regulations) do not meet today's standards. So much for public policy."

[Basis of Claimant's Case]

Respondent also contends that the claimant's case is based on circumstantial evidence, vague and unsupported charges which usually carry no weight in and of themselves. The answer to this contention is provided by the New York Court of Appeals in *Castle Hill Beach Club, Inc. vs. Arbury*, 2 N.Y. 2d., 596, a case also involving discrimination under the New York law. The Court said:

"It may be that the telephone listing, etc., as isolated facts, do not justify the conclusion that the membership corporation was a mere sham designed to conceal the truly public nature of the enterprise. But, in our judg-

ment, the record, considered as a whole, leads to that conclusion. The various aspects of a plan or scheme, when considered singly, may very well appear innocent. The true nature of the plan or scheme is revealed only when the various aspects are viewed as a totality. Such is this case."

And in *F. W. Woolworth Company v. N.L.R.B.*, 2 F.2d, 658, the Court, in commenting on this phase of testimony, stated:

"Implicit in petitioner's argument is a basic objection to reliance upon so-called 'circumstantial evidence.' But courts and other triers of facts, in a multitude of cases, must rely upon such evidence, i.e., inference from testimony as to attitudes, acts and deeds; where such matters as purpose, plans, designs, motives, intent or similar matters, are involved, the use of such inferences is often indispensable. Persons engaged in unlawful conduct seldom write letters or make public announcements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, 'Use me,' like the cake bearing the words 'Eat me,' which Alice found helpful in Wonderland."

Under all the testimony and evidence in this case we are irresistibly lead to believe that up to the time Ragland filed his Complaint No. 189 with the FEPC nothing was done concerning his absences, his work record, and his loyalty to the department, but that after the complaint was filed a course of action was commenced by his supervisors resulting in his discharge and that this discharge was discriminatory and in retaliation for filing Complaint No. 189.

An order shall be entered re-instating Ragland from the date of his discharge to the date of his death, November 18, 1957, and his estate be paid such compensation as he would have been entitled to while so employed.

ORDER

In this matter a public hearing having been held in accordance with the Michigan Fair Employment Practices Law and the rules and regulations of the Commission, and the Commissions having read the transcript of the testi-

mony and considered the record as a whole and having filed Findings of Fact and Conclusions of Law and an Opinion on said matter;

IT IS HEREBY ORDERED that the Respondent re-instate William R. Ragland from the date of his discharge, January 2, 1957, to the date of his death, November 18, 1957, and pay to the estate of William R. Ragland such wages, benefits and other compensation to which he would have been entitled to for such period of time.

IT IS FURTHER ORDERED that the Respondent, City of Detroit, Department of Water

Supply, herewith cease and desist from discriminating against any and all employees because of their race, color, religion, national origin and ancestry, or because they have made a charge, testified, assisted or participated in any manner in any investigation, proceeding or hearing under the Fair Employment Practices Act.

IT IS FURTHER ORDERED that the Department of Water Supply notify all of its employees in writing that they may avail themselves of the services of the Fair Employment Practices Commission without retaliation from the Department.

EMPLOYMENT

Unfair Labor Practices—Federal Statutes

INTRACOASTAL TERMINAL, INC. and LOUISIANA PROCESSING COMPANY, INC. and GENERAL TRUCK DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS LOCAL 270.

National Labor Relations Board, November 25, 1959, 125 NLRB No. 31.

SUMMARY: Upon complaint that corporate employers at Harvey, Louisiana, were engaging in unfair labor practices violative of the National Labor Relations Act, a hearing was conducted by an NLRB trial examiner. In his intermediate report the examiner found that, while a petition for an NLRB representation election was pending, the employers had posted in August, 1957, a notice that, after complaints from Negro employees, they confirmed their policy of "preventing as far as possible discrimination against colored employees on the basis of color alone," and that "Effective January 1, 1958, all employees, regardless of race, will be entitled to two weeks vacation after one year of continuous service." Further, it was found that after the petitioning union had been certified, Negro employees learned, in the summer of 1958, that they would receive one-week vacations as before. The examiner, noting that the employers had a valid motive for announcing the nondiscriminatory policy in order to rectify Negro employees' complaints rather than to interfere with the employees' choice, found that, as the employees were not informed prior to the election of a decision to continue the old policy, the decision was made sometime afterward. This unilateral repudiation of the new policy, after the selection of a bargaining agent, was found to be a failure to bargain [violating Sec. 8(a)(5) of the NLRA] and discrimination having the effect of discouraging union membership [violating Sec. 8(a)(3) of NLRA]. The NLRB agreed with the examiner's findings and conclusions, ordered the employers to cease and desist from unilaterally changing working conditions and from discouraging union membership by withholding paid vacations under the August, 1957 plan. It was further required that the employers "make whole" Negro employees for any loss of paid vacations resulting from the employers' violation of the NLRA. Portions of the trial examiner's report and order and the NLRB's decision and order follow. (Footnotes numbered the same as in original opinion).

Intermediate Report

A. BRUCE HUNT, Trial Examiner

. . .

B. CHRONOLOGY OF EVENTS

On August 26, 1957, while petitions were pending before the Board in Cases Nos. 15-RC-1549 and 15-RC-1574, the Respondents posted a notice to employees, saying that complaints had been received from the Negro employees, that a meeting of all employees had been held, and that as a result the Respondents confirmed their policy of "preventing as far as possible discrimination against the colored employees on the basis of color alone." The notice announced that effective immediately all employees would be eligible for bonuses on the same basis and that employees would be upgraded on the basis of ability, without regard to race. We do not have an issue concerning those two provisions. The notice contained a third provision, as follows, which was not fulfilled:

Effective January 1, 1958, all employees, regardless of race, will be entitled to two weeks vacation after one year of continuous service.

During 1957 white employees who had been at work for a year were entitled to a paid vacation of 2 weeks. Negro employees of like service were entitled to 1 week's paid vacation. Thus, the effect of the new vacation policy, had it been carried out, would have been to double the vacation periods of eligible Negro employees.

On the day that the above notice was posted, the Board issued its Decision and Direction of Election in the representation cases. On September 24, 1957, an election was held. Of 62 votes cast, 43 were in favor of the Union. There is no allegation or evidence that the Respondents' announced intent to end racial discrimination in employment was motivated by a desire to cause the Union's defeat in the election. Instead, as the Respondents said, they were motivated by the Negroes' complaints against the unequal working conditions.

On October 2, 1957, the Board certified the Union. During the remainder of the year, representatives of the Respondents and the Union

met in eight bargaining sessions. Proposals and counterproposals were exchanged, discussions took place, but an agreement was not reached.

. . .

At the outset of this factual recital, we saw that during August 1957 the Respondents posted a notice to employees that, effective January 1, 1958, vacations would be awarded without discrimination because of race. We saw too that the effect of such change in vacation policy was to double the vacation periods of Negro employees. During 1958, however, the white and colored employees received unequal vacations as in past years. The Respondents made no written or oral announcement that the vacation provision of the notice of August 1957 was being rescinded. The Respondents simply kept silent and it was not until the summer of 1958, when vacations were being scheduled, that the Negro employees learned that they would not receive vacations of 2 weeks. The record does not disclose the date of the Respondents' decision to repudiate the vacation provision of the notice of August 1957. Hooper, their president, testified that the Board's Direction of Election was received after the notice was posted, that he understood that any change in working conditions, whether to the employees' benefit or detriment, "would be looked upon in the same light as some intimidation or some act of reprisal," and that "rather than get involved in a situation where we could be charged with trying to entice [the employees] in the election," the Respondents decided not to carry out the new vacation policy. The quoted testimony indicates that the decision to continue a racially discriminatory vacation policy was made before the election, but such conclusion is not warranted. This is so because the Respondents did not inform the employees of their decision and, therefore, did nothing to remove the possible "enticement" of employees which Hooper professed to have seen in the notice. Moreover, Hooper also testified that he could not remember whether the decision was made before the Union was certified. I conclude that the decision was made sometime after the election.³ Under "Conclusions" below, we consider whether repudiation of the new vacation policy was discrimination in viola-

3. (Footnote omitted).

tion of Section 8(a)(3) as well as a refusal to bargain in violation of Section 8(a)(5).

C. CONCLUSIONS

Before discussing the Respondents' failure to take up with the Union the matters set out above, it should be noted that the Respondents' duty to bargain with the Union continued for 12 months after the certification and that the 12-month period had not expired at any material time. *Clark & Lewis Co.*, 122 NLRB No. 103.

2. *The Respondents' repudiation of the policy eliminating racial discrimination in vacations*

This issue involves the Respondents' unilateral repudiation of its announcement to employees that during 1958 the colored employees would be granted vacations upon the same basis as the white employees. As noted, the Respondents' decision to repudiate was not communicated to the employees until vacations were scheduled during the summer of 1958. Unlike the other issues discussed above, this issue involves an alleged violation of Section 8(a)(3) as well as Section 8(a)(5). The latter will be decided first.

In defense, the Respondents argue that since the nondiscriminatory vacation policy was not to become effective until 1958, it did not become effective at all and that the racially discriminatory policy remained in effect. This defense must be rejected. From August 1957 when the nondiscriminatory policy was announced until the summer of 1958 when colored employees learned that they would not receive vacations on an equal basis with white employees, that policy was calculated to serve as an inducement to colored employees to continue in the Respondents' service. The nondiscriminatory vacation policy was as much a condition of employment as any benefit previously enjoyed by employees. Cf. *Armstrong Cork Co. v. N.L.R.B.*, 211 F.2d 843, 33 LRRM 2789 (C.A. 5), enf. 103 NLRB 133.

The Respondents also assert that they would have been properly subject to a charge of having violated the Act if they had carried out the nondiscriminatory policy. The Respondents are mistaken. No party to this case contends that the Respondents had an invalid motive in announcing the end of its racial discrimination.

Since the motive for the nondiscriminatory policy was to rectify the complaints of Negroes against racial discrimination in employment, and since the motive was not to interfere with the employees' pre-election activities, the Respondents were free to formulate and announce the new policy. Cf. *Burns Brick Co.*, 80 NLRB 389. Once the new policy was announced, it became a condition of employment notwithstanding that no colored employee would receive a vacation equal to the vacations of white employees until the following year. This is so for the reasons recited in the paragraph next above. Nevertheless, the Respondents, if not motivated by union considerations, were free to unilaterally repudiate the new policy so long as the employees were not represented by a collective bargaining agent. When, however, sometime following the certification of the Union, the Respondents chose to repudiate the new policy by granting 1958 vacations on the old basis, their obligations was to inform the Union and to afford it an opportunity to bargain on the subject. Cf. *Phelps Dodge Cooper Products Corp.*, 101 NLRB 360. Instead, the Respondents remained silent. I find that the Respondents, by unilaterally repudiating the new vacation policy, violated Section 8(a)(5) and (1).⁵

The remaining issue is whether the Respondents' failure to carry out the new vacation policy was discrimination in violation of Section 8(a)(3). The complaint alleges that the Respondents repudiated the new policy because the employees had selected the Union as their representative and in order to discourage union mem-

5. It may be noted that, if the Respondents had proposed to the Union that the old policy be reinstated, the Union could not lawfully have agreed. This is so because the Union's position as the statutory representative of employees requires that it not agree to discrimination in employment based upon race. *Whitfield, et al. v. United Steelworkers of America, et al.*, 263 F.2d 546, 43 LRRM 2496 (C.A. 5). But the fact that the Union would have been required to take a position contrary to that of the Respondents, if the Respondents had fulfilled their duty to inform the Union of the contemplated return to the old vacation policy, does not excuse the Respondents' failure to inform it. Who can say what would have been the result of bargaining upon the subject? Perhaps the Union, in the give-and-take of bargaining, could have persuaded the Respondents to adhere to the new policy. Perhaps not. But only after good faith bargaining to an impasse on the subject of racial discrimination in vacations would the Respondents have been entitled to unilaterally reinstate the old policy.

bership and activities. In analyzing this issue, we begin with the facts that in 1957 and earlier the Respondents treated colored employees differently than white employees in the matter of vacations and that in August 1957 the Respondents' announcement of a nondiscriminatory vacation policy was made because the Negroes had complained, not because the Negroes were active in the Union. If the discrimination had been resumed in 1958 for the reason which caused it in earlier years, that is, because the Negroes are not Caucasians, there would have been no violation of Section 8(a)(3) because the discrimination in 1958 would have been founded in race, not "to encourage or discourage membership in any labor organization." But, as the Respondents in effect acknowledge, they reneged upon their promise of equal vacations because the Union had become the employees' representative—in other words, the Respondents would not have reneged if the Union had not been in the picture. Two questions are presented. Were the Respondents, in renewing the racial discrimination, motivated by a deliberate intent to retaliate against employees for having designated the Union as their representative? If not, was the Respondents' action nevertheless violative of Section 8(a)(3) because it discouraged membership in the Union? The General Counsel would answer each question in the affirmative. There is no evidence to show the number of Negroes in the bargaining unit, or whether any of them was active in behalf of the Union or was so regarded by the Respondents. Nor is there evidence that any representative of management said to anyone that the renewal of racial discrimination in vacations was motivated by the action or votes of any Negro employees. In fact, there is no evidence of any independent violation of Section 8(a)(1). Although one may infer that the Respondents were hostile toward the process of collective bargaining because the Respondents violated Section 8(a)(5) as found above, in the absence of other supporting evidence I cannot infer that the Respondents' renewal of racial discrimination in vacations was founded in a belief that Negro employees had been active in behalf of the Union. Accordingly, the first question is answered in the negative.

Turning to the second question, the General Counsel contends that where an employer takes action detrimental to the employees' working conditions, which action would not have been taken but for the organizational activities of

employees, the action inherently discourages such activities although the employer may have acted in good faith. I agree that under the facts here a violation of Section 8(a)(3) must be found. At first glance it may seem that we have a unique situation where race discrimination is alleged and found to be violative of the Act. But that is not so. It is true that race was the cause of the original discrimination. But that cause ended with the announcement of the new vacation policy. When the Respondents later repudiated that policy, they acted because of the presence of the Union, not because of the race of any employees. It follows that the Negro employees had no cause to believe in 1958 that their race was again the reason for discrimination in vacations, but had cause to believe that the Union's presence was the reason. That being so, I cannot escape the conclusion that the Respondent's repudiation of the new policy had a natural tendency to discourage Negro employees from joining the Union. Cf. *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 74 S.Ct. 323. It matters not that the record is silent upon the subject of union activities by Negro employees. Even if no Negro was interested in union representation before the Respondents' repudiation of the new policy, the fact remains that a natural tendency of the repudiation was to discourage union membership by Negro employees in the future. Cf. *Radio Officers'*, supra; *Summit Mining Corp. v. N.L.R.B.*, 260 F.2d 894, 43 LRRM 2020 (C.A. 3), enfg. 119 NLRB 1668. It also matters not that the Respondents may have acted in good faith, believing that adherence to the new policy would have been violative of the Act. If the Respondents so believed, they were mistaken.⁶ The doctrine that good faith does not excuse an unfair labor practice is well settled. *Radio Officers'*, supra. I find that the Respondents violated Section 8(a)(3) and (1) of the Act.

IV. THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall recommend that each Negro employee who was entitled to a paid vacation of 2 weeks in 1958, but who received a paid

6. The General Counsel does not concede that the Respondents acted in good faith.

vacation of only 1 week, be made whole for the discrimination against him by being given (1) an additional week's vacation with pay in 1959 or, in the alternative, (2) an amount of money equal to his weekly pay. If any such employee be no longer at work for the Respondents, he shall be made whole by the alternative method. I shall recommend also that the Respondents preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment

records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of vacation pay due under the terms of these Recommendations. I shall recommend further, in order to make effective the interdependent guarantees of Section 7 of the Act, that the Respondents cease and desist from, in any manner, infringing upon the rights guaranteed in said Section. *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426; *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4).

Board's Decision and Order

On May 15, 1959, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report, and the Respondents and the General Counsel filed briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and the briefs, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner with the modifications and additions noted below.

1. We agree with the Trial Examiner that the Respondents violated Sections 8(a)(5) and (1) of the Act by unilaterally instituting the following changes in the employees' working conditions, without notifying or consulting with the newly certified bargaining representative:

(3) Changing the vacation plan applicable to Negro employees in the unit.³

3. During negotiations in late 1957 the Respondents proposed that all employees of 1 year's service receive vacations of 1 week and that those of 3 years' service receive vacations of 2 weeks. The substance of that proposal, which was unacceptable to the

2. We agree with the Trial Examiner that the Respondents also violated Section 8(a)(3) and (1) by the above-mentioned change in vacation plan.⁴ On August 26, 1957, before the representation election and the certification of the Union, the Respondents posted a notice which stated a general policy to eliminate racial discrimination in employment conditions, including bonuses, promotions and vacations, and formally announced that, effective January 1, 1958, Negro employees having 1 year of continuous service would be granted 2 weeks' vacation, equal to that accorded white employees. As properly found by the Trial Examiner, the August 26, 1957 formal announcement was prompted by earlier general complaints from the Negro employees, and was motivated by racial and not Union considerations. In October, 1957, the Union, having won the election, was certified by the Board. In July, 1958, when the vacation season arrived for that year, the Respondents repudiated the August, 1957 award of equal vacation benefits to Negro employees, allowing them only the pre-existing 1 week vacation after a year of service.

The Respondents contend that they decided to rescind the 2 week vacation policy for Negro

Union, was (1) that racial discrimination in vacations be eliminated and (2) to decrease the vacation period of white employees whose length of service was 1 or 2 years. The Respondents say in their brief:

The respondents' plan . . . proposes the same vacation for the colored and the white employees. This proposal . . . was not necessarily a statement of the full extent to which the employer was prepared to go in negotiations . . .

If, at the time of this proposal, the Respondents had given thought to repudiating the new vacation policy, they failed to tell the union.

8. As the General Counsel conceded the economic motivation of the other unilateral action, only this change was alleged to be a violation of Section 8(a)(3) of the Act.

employees in order to avoid charges of interference with the representation election. However, the record plainly indicates that the Respondents posted no announcement, as they did in August, 1957, or in any other manner, direct or indirect, disclosed to the employees such decision to rescind either before the election or at any time prior to July, 1958. Nor was the Union apprised before July, 1958, of this withdrawal of vacation rights, even though there were 9 collective bargaining sessions between October, 1957, and January, 1958. The Respondents' president testified that he did not remember whether the decision to revoke was made before the Union was certified. On the entire record, we are in agreement with the Trial Examiner's rejection of the Respondents' contention and with his finding that the decision to repudiate was made after the election and the Union's certification. In all the circumstances, it is clear, and we find that the Negro employees had reasonable cause to believe that their 2-week vacation rights were denied not for racial reasons, but because the Union had become the employees' certified representative, and that such a belief was the natural and probable consequence of the Respondents' unilateral action.⁹ Accordingly, we find, as did the Trial Examiner, that the Negro employees were discriminated against within the meaning of Section 8(a)(3) and (1) of the Act.

ORDER

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents, Intra-coastal Terminal, Inc., and Louisiana Processing Company, Inc., Harvey, Louisiana, their officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Unilaterally terminating any portion of their business operations in which employees in the appropriate unit work, or laying off such employees as a result of such termination, or changing the schedules of work or vacation rights of such employees, without first consulting General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local 270, or in any similar or related manner refusing to bargain collectively with said union as the exclusive representative of all

production and maintenance employees at the Respondents' operations in Harvey, Louisiana, including leadermen, crane operators, hystor operators, maintenance men, welders, and laborers, but excluding all office clerical employees, professional employees, guards, watchmen, foremen and all other supervisors as defined in the Act;

(b) Discouraging membership in said Union or in any other labor organization by withholding or refusing to grant to employees paid vacations under the vacation plan announced by the Respondents August 26, 1957; and

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist said Union or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with said Union as the exclusive representative of all employees in the above described appropriate unit, and embody in a signed agreement any understanding reached;

(b) Make whole their Negro employees, in the manner set forth in the section of the Intermediate Report herein entitled "The Remedy", for any loss of paid vacations they suffered by reason of the Respondents' discrimination against them.

(c) Preserve and make available to the Board or its agents all payroll and other records, as set forth in the section of the Intermediate Report herein entitled "The Remedy";

(d) Post at their plants at Harvey, Louisiana, copies of the notice attached hereto and marked "Appendix A."¹⁰ Copies of said notice, to be

9. See *Radio Officers' Union etc. v. N.L.R.B.*, 347 U.S. 17, 45, 51; *Summit Mining Corp. v. N.L.R.B.*, 260 F.2d 894, 898 (C.A. 8); *Crosby Chemicals, Inc.*, 121 NLRB No. 51, pp. 4-7.

10. In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

furnished by the Regional Director for the Fifteenth Region of the Board, shall, after being duly signed by the Respondents' authorized representative, be posted by the Respondents immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material; and

(e) Notify the Regional Director of the Fifteenth Region in writing within ten (10) days from the date of this Order what steps the Respondents have taken to comply herewith.

APPENDIX A

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

• • •

WE WILL make whole our Negro employees for any loss of paid vacations they suffered by reason of our discrimination against them.

• • •

PUBLIC SERVICES Insurance—Washington

The insurance commissioner of the state of Washington in a letter dated November 17, 1958, interpreted the state's Anti-Discrimination Act [2 Race Rel. L. Rep. 461 (1957)] to include the insurance business and to mean that the granting of property or casualty insurance or the consideration of such risks may not be based on the applicant's race. He requires, "in keeping with the spirit of the law," that applications for insurance (other than life) shall not ask questions, require symbols, or otherwise attempt to determine race, religion, or national origin, unless prior permission is obtained for an exemption for a bona fide reason.

Office of
INSURANCE COMMISSIONER
William A. Sullivan
Commissioner
OLYMPIA

To all insurance companies authorized to write automobile liability and property damage insurance in the State of Washington:

RE: ANTI-DISCRIMINATION

The Laws of the State of Washington prohibit discrimination because of race, religion, or national origin in public accommodations and services, which would include the business of insurance. In keeping with the spirit of the law the Office of the Insurance Commissioner requires that applications for insurance (other than Life) shall not list questions or require symbols, or use other means designed to deter-

mine race, religion, or national origin, unless permission has first been obtained for an exemption for a bona fide reason.

The Anti-Discrimination Act of 1957 (RCW 49.60) would mean that the granting of property or casualty insurance or the consideration of such risks, may not be based on the race of the applicant.

Therefore, I will ask you to re-examine the application forms currently in use by your company (or companies) and delete any questions pertaining to race, religion or national origin.

Yours very truly,

WILLIAM A. SULLIVAN
Insurance Commissioner

WAS: fw
Dated: November 17, 1958
mam (7/13/59)

ATTORNEYS GENERAL

EDUCATION Public Schools—California

In response to a request by a state legislator for an opinion on whether it is unconstitutional discrimination for a public school district to have a swimming team whose only practice facilities are at a privately owned pool, the owners of which refuse admission to Negroes and thus prevent Negroes from trying out for the team, the California attorney general on September 17, 1959, in opinion No. 59/174, concluded that the swimming team arrangement, in effectively barring Negro students from access to a school sponsored and supported athletic activity, was racially discriminatory and a violation of the equal protection clause of the Fourteenth Amendment under the *School Segregation Cases*.

OPINION OF STANLEY MOSK, ATTORNEY GENERAL; WALTER WIESNER, DEPUTY ATTORNEY GENERAL.

The Honorable S. C. Masterson, Assemblyman, 11th Assembly District, has requested the opinion of this office on the following question:

"Is it an unconstitutional act of discrimination for a public school district to have a swimming team whose only facilities for practice are at a privately owned swimming pool, the owners of which refuse admittance to members of the Negro race, thus preventing Negroes from trying out for the school swimming team?"

The conclusion may be summarized as follows:

A public school district may not constitutionally operate its swimming program on a racially segregated basis.

ANALYSIS

The situation which gives rise to this question is as follows: A public high school has a swimming team but does not have a swimming pool. The members of the swimming team practice in a pool of a privately owned men's residence and social club, whose rules provide that only members may use the pool. Students signing up for the team are told that they must obtain membership in the club in order to be on the team. The club permits white students to take out

junior memberships. These junior memberships are not available, however, to negroes who wish to become members of the swimming team. The result is that negroes are in effect denied the opportunity of participating in the school swimming program. The question is whether a public school may constitutionally maintain an organized swimming program on the above basis.

Since the decisions of the United States Supreme Court in the school segregation cases (*Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294; *Bolling v. Sharpe*, 347 U.S. 497, unanimously reaffirmed in *Cooper v. Aaron*, 358 U.S. 1), holding racial segregation in the public schools unconstitutional, there is only one possible answer to the above question. It may not.

Two of the cases cited by the court in *Brown v. Board of Education*, 347 U.S. 483, presented other aspects of the problem of discrimination against colored students in publicly supported schools. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, held that the failure to furnish equal facilities within the state to colored students was a denial of the equal protection of the laws. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, held that discrimination, in the form of separate sections in the classrooms and school cafeteria, after admittance of a colored student to a graduate school, was a denial of the equal

protection of the laws. While these two cases are perhaps more nearly analogous to the situation presented here, it is believed that the Brown case represents the final step to date in the evolution of the rights of colored students and that the principle announced by the court in that case must therefore be applied in determining whether any specific act of racial discrimination in the public schools is prohibited by the 14th Amendment.

As described by the Supreme Court itself, the essence of the Brown doctrine is "the funda-

mental principle that racial discrimination in public education is unconstitutional" (Brown v. Board of Education, *supra*, 349 U.S. at 298). The swimming team arrangement in question effectively bars negro students from access to a particular school-sponsored, school-supported athletic activity. Whatever motivation explains the action, the net result is discrimination against negro students on account of their race. It follows that the swimming team arrangement is illegal, being a violation of the equal protection clause of the 14th Amendment.

ELECTIONS

Registration—New Jersey

Complying with a request by the superintendent of elections in Jersey City, New Jersey, for an opinion as to whether former residents of Puerto Rico who are unable to speak or read the English language are entitled to register and vote, the state attorney general stated in formal opinion No. 19 on August 26, 1959, that they are so entitled and that any statutory provision or interpretation that would deny the vote to anyone because of inability to understand English would be void as an attempt to modify the state constitutional provisions concerning voting qualifications, which are exclusive and which do not include as a requirement the ability in question.

Mr. William MacPhail
Superintendent of Elections
595 Newark Avenue
Jersey City, New Jersey

FORMAL OPINION 1959 NO. 19

Dear Mr. MacPhail:

You have requested an opinion whether former residents of Puerto Rico who have appeared for the purpose of being registered to vote and who are unable to speak or read the English language are entitled to register and vote.

The qualifications for voting in New Jersey are set out in Art. 2 N.J. Const. (1947). Paragraph 3 sets out the qualifications of citizenship of the United States, attainment of 21 years of age, residence in the state for 6 months and in the county for 60 days. Paragraph 6 denies suffrage to idiots and insane persons. Paragraph 7 denies suffrage to persons convicted of crimes designated by the legislature. (R. S. 19:

4-1 enumerates the crimes which disqualify.)

While you have made reference to this problem as it applies to Puerto Ricans, this opinion applies as well to all citizens who cannot read or write.

These constitutional provisions concerning qualification to vote are exclusive. The legislature has no power either to enlarge or diminish them. Cf. *Stothers v. Martini*, 6 N.J. 560, 566 (1951); *Imbrie v. Marsh*, 3 N.J. 578, 585 (1950). Any provision or interpretation of statutes which would deny the right to vote based on inability to understand English would attempt to modify the constitutional provisions and would therefore be void.

Although the legislature may not change the constitutional qualification on the right to vote, it may adopt reasonable regulations for the exercise of the rights conferred by the Constitution. *Sadloch v. Allan*, 25 N.J. 118, 122 (1957); see *Lassiter v. Northampton County Bd. of Elections*, 79 S.Ct. 985 (1959). In exercising this power the legislature has provided that

everyone must be permanently registered in order to exercise his franchise. R.S. 19:31-1.1. As part of the process of registration, the applicant must subscribe to the following oath or affirmation which appears in the statute, R.S. 19:31-6:

"You do solemnly swear (or affirm) that you will fully and truly answer such questions as shall be put to you touching your eligibility as a voter under the laws of this State."

If it were the legislative intent that such an oath be administered only in English so that a person unable to speak English could not take the oath, the legislation would violate the Constitution and therefore be void. However, it would seem that it was not the intention of the legislature that the oath be exclusively administered in English. The requirement that a registrant subscribe to an oath written in a statute in English has been part of the registration law at least since 1930. L. 1930 c. 187 par. 384. From 1930 until 1944 this law expressly provided for the rendering of assistance in preparing official ballots to persons unable to read the English language. L. 1930 c. 187 par. 198; (former) R.S. 19:15-35; L. 1944 c. 230 sec. 4. Certainly, there would not have been a provision in the law for assistance in preparing ballots to persons unable to read English if it had been the intent of the legislature to have already disfranchised them at

the registration stage by requiring them to understand and take an oath administered in English. The oath may be administered in any language.

The repeal in the 1944 act, supra, of the provision for aid in preparing their ballots to persons unable to read English must be considered intentional, and an indication that assistance may not be rendered in the voting booth to a person unable to speak English who is physically able to mark the ballot. Compare the language repealed, L. 1930 c. 187 par. 198, with the present provision, N.J.S.A. 19:31A-8 (authorizing aid to the blind or physically disabled only), which was enacted by L. 1944 c. 230 sec. 2, a part of the act in which the 1930 act (later embodied in R.S. 19:15-35) was repealed, L. 1944 c. 230 sec. 4. See also *State v. Sweeney*, 154 Ohio St. 223, 94 N.E. 2d 785 (Sup. Ct. 1950). But this does not make impossible the effective and intelligent exercise of the franchise by persons unable to read and write English. Many states permit persons unable to read English to vote. *Lassiter v. Northampton County Bd. of Elections*, supra, 79 S. Ct. at 990 n. 7.

Very truly yours,

DAVID D. FURMAN
Attorney General

By
William L. Boyan
Deputy Attorney General

GOVERNMENTAL FACILITIES Training Schools—Maryland

In response to letters by the director of the Maryland State department of public welfare requesting an opinion as to whether a statute requiring racially segregated operation of state training schools for the care and reformation of minors committed thereto under state laws violates the equal protection clause of the Fourteenth Amendment, the state attorney general on September 10, 1959, called attention to his previous opinion of January 11, 1956, stating that in his view the state training schools, although performing some educational functions are primarily reformatories and do not fall within the term "public education" as used in the *School Segregation Cases*.

September 10, 1959.

THOMAS J. S. WAXTER, DIRECTOR STATE
DEPARTMENT OF PUBLIC WELFARE.

Receipt is acknowledged of your recent letters

requesting our present view as to the constitutionality of Sections 657 and 659-661 of Article 27, Annotated Code of Maryland (1957 Edition).

These statutes relate to the State training

schools, namely, Boys' Village, Maryland Training School, Montrose School, and Barrett School, and provide that such institutions are public agencies for the care and reformation of minors committed thereto under the laws of this State. The statutes further provide that Maryland Training School shall be for white boys, Boys' Village for colored boys, Montrose School for white girls, and Barrett School for colored girls.

The precise constitutional issue presented in your letter is whether the legislative mandate requiring operation of Maryland's training schools on a racially segregated basis violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

By opinion dated January 11, 1956, (41 Opinions of the Attorney General 120) we considered this same question in light of judicial decisions as of that time, particularly the decision of the Supreme Court of the United States in *Brown vs. Board of Education*, 347 U. S. 493 (1954), holding segregation of children in public schools solely on the basis of race to be unconstitutional. We there held, in pertinent substance, that a presumption of constitutionality attaches to each act of the Legislature and that the Office of Attorney General, as an arm of the executive branch of our government, was constrained to denounce an existing law as violative of state or federal constitutional guarantees only in those situations where a fair interpretation of a court decision indicates that a challenged law is constitutionally invalid. We then noted that the training schools were primarily intended as places to separate erring minors from the corrupting influence of improper circumstances and associates and that these institutions were both legislatively and judicially declared to be reformatories. While we fully recognized that education was a part of the process of reforming the individuals committed to the training schools, and that to a degree the institutions have been considered as educational institutions, it was our view that they did not fall within the purview of the term "public education" in the sense that such term was used by the Supreme Court in the *Brown* case. Specifically, we said:

"... the distinguishing characteristic of such institutions (training schools), to our mind, is that inmates are there under legal compulsion and are denied the privilege of leaving the school. The inmates are, in other words, *confined* to these institutions. This is a situation

different from that which was before the Supreme Court in the Public School cases, in that *educational* equality was the problem before the court. Here, desegregation of the institution, contrary to express legislative intent evidenced by the statutes creating the institutions, could have the effect of enforcing social as well as *educational* association among the inmates for twenty-four hours a day."

* * * * *

"One further point is worthy of mention. Basically the argument in the public education cases turned on the issue of whether to retain or reject the 'separate but equal' doctrine laid down in *Plessy vs. Ferguson*, 163 U.S. 537, 41 L.Ed. 256. We are not aware of any instance in which the doctrine of 'separate but equal' has been applied to the field of correctional institutions such as those here under discussion. Even though the effect of the public education cases is to abolish the doctrine in all fields to which it was heretofore applicable (which has been questioned), we do not believe it can be fairly said the effect would be carried over into still other fields of activity never heretofore included within the doctrine."

We have found nothing in the present law as it has developed since our opinion of January 11, 1956, which is at variance with our earlier views, and we consequently reaffirm the same, restating herein our ultimate conclusion in that opinion as follows:

"... the present case is not such a clear one as to warrant our taking the extraordinary action of advising your Department to ignore the express will of the Legislature".

We think that the opinion of the United States District Court in *Nichols v. McGee*, 169 F. Supp. 721 (N. D., Calif., 1959) bears sufficient relationship to the present question to include a reference thereto in this opinion. In that case the petitioner, an inmate of a State prison, contended that his constitutional guarantee of equal protection of the law was denied him in that he was required to join an exclusively Negro line formation when proceeding to his assigned cell-block for daily lockup and to the prison dining hall, and that he was required to eat in a walled-off and exclusively Negro compartment in the prison dining hall. He contended that such systematic segregation caused him a loss of self-respect, thereby making it difficult for him to

effect the same degree of rehabilitation possible for unsegregated prisoners of other races. He relied principally on *Brown v. Board of Education*, supra. The Court there held: "By no parity of reasoning can the rationale of *Brown v. Board of Education* be extended to state penal institutions where the inmates, and their control, pose difficulties not found in educational systems.

Federal courts have long been loath to interfere in the administration of state prisons".

Very truly yours,

C. FERDINAND SYBERT
Attorney General

Robert C. Murphy
Spec. Asst. Attorney General

HOUSING

Urban Renewal—California

Under the California Redevelopment law, community redevelopment agencies, being required to provide a feasible method for relocating persons displaced from urban renewal areas, are authorized to incur expenses necessary to the operation of rehousing bureaus to assist such persons in obtaining other adequate housing. A state legislator requested an opinion of the state attorney general as to whether the rehousing bureaus, in servicing the listings of landlords interested in renting property to such displaced persons, might lawfully do so in the case of landlords who will not accept members of minority groups as tenants. The attorney general on July 1, 1959, in opinion 59/95, ruled that redevelopment agencies must refrain from the practice questioned inasmuch as it constitutes state action in violation of the equal protection clause of the Fourteenth Amendment.

THE HONORABLE PHILLIP BURTON, ASSEMBLYMAN, 20th ASSEMBLY DISTRICT, has requested the opinion of this office on the following question:

May a redevelopment agency service the listing of a landlord who will not accept members of minority groups as tenants.

The conclusion is as follows:

A redevelopment agency may not service the listing of a landlord who will not accept members of minority groups as tenants.

ANALYSIS

The Community Redevelopment Law (secs. 33000 through 33985 of the Health and Saf. Code, all section references are to the Health and Safety Code) created in each community a public body to be known as the redevelopment agency of the community (sec. 33200). These agencies may not transact any business or exercise any powers unless the legislative body of the community, by resolution, declares that there is a need for an agency to function in the community (sec. 33201). Agencies authorized

to function in the communities are given various powers (secs. 33260 through 33280), including the right to acquire property for the purpose of improving, rehabilitating, and redeveloping blighted areas (sec. 33267). As an incidental duty, redevelopment agencies are required to provide a feasible method for the relocation of persons displaced from an urban renewal area (sec. 33985) and are authorized to incur any necessary expenses required for the operation of rehousing bureaus to assist such displaced persons in obtaining other adequate housing (sec. 33270).

In the course of carrying out the duty of assisting displaced persons to find other housing, the rehousing bureaus service the listings of landlords interested in renting property to such displaced persons. Certain of these landlords will not accept members of minority groups as tenants. The question is whether the agency may lawfully bear the expense and confer the benefits of this service where the landlord discriminates against minority groups. The right of the landlord to lease his property to whomsoever he pleases is not involved.

[Fourteenth Amendment Prohibitions]

It is necessary, inasmuch as there is no statute specifically prohibiting the servicing of such listings, to determine whether such action by a public agency is prohibited by the equal protection clause of the Fourteenth Amendment of the United States Constitution or whether it is contrary to the public policy of this State. The area of proscribed action under the Fourteenth Amendment is, today, quite large. Discrimination in public education is forbidden. (*Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294; *Cooper v. Aaron*, (— U.S. —), 3 L.Ed.2d 5). Discrimination is prohibited in schools organized pursuant to private trusts if such schools are operated and administered by a public trustee (*Pennsylvania v. Board of Trusts*, 353 U.S. 230). And discrimination is prohibited in the operation of publicly owned facilities, e.g., state parks, even if the facilities are operated by private parties under lease arrangements (*Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971; *Tate v. Department of Conservation and Development*, 133 F.Supp. 53). See, also, the extended discussion of recent developments in this area in 32 Ops. Cal. Atty. Gen. 264, dealing with the relationship between fraternities and sororities and the State colleges and universities.

Although there are hundreds of cases in this area, no case has been found in which this precise question was raised. A similar question was, however, raised in *Mitchell v. Boys Club of Metropolitan Police, D.C.* (D. C. 1957), 157 F.Supp. 101, where the court held that discrimination by a private club was not prohibited. The plaintiff had requested, in the alternative, that the court enjoin the Board of Commissioners of the District of Columbia from contributing any of the property, facilities, personnel or services of the District to the private organization while it operated racially-segregated clubs. The court did not reach the issue, holding instead that it lacked jurisdiction over the three-member Board of Commissioners.

The *Mitchell* case, *supra*, where the court refused to hold that the Constitution prohibited racial discrimination by a private organization, and other cases of similar import, illustrate the fact that it is governmental action which is prohibited by the Constitution. It is not only direct discrimination by a government which is prohibited, but also governmental action which

has the practical effect of encouraging and fostering discrimination by private persons. While state action which only incidentally and passively benefits private persons engaging in racial discrimination, i.e., the furnishing of police and fire protection, is not prohibited, the tenor of the recent decisions is to the effect that state action which actively encourages and fosters racial discrimination by private persons is unconstitutional.

[Shelley and Barrows Decisions]

The two Supreme Court Decisions which best illustrate the above point are *Shelley v. Kraemer* (1948), 334 U.S. 1, and *Barrows v. Jackson* (1953), 346 U.S. 249. Both involved the constitutionality of state action which had the effect of directly encouraging racial discrimination by private parties. *Shelley* held that a state court could not enforce racial restrictions agreed upon by private parties. *Barrows* held that the party breaching a restrictive covenant could not be held liable in an action for damages. In *Shelley*, the court emphasized the fact that the enjoyment of property rights is "an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." It pointed out also that while the amendment does not prevent "merely private conduct however discriminatory or wrongful," it does prohibit state action which directly encourages racial discrimination by private parties. In *Barrows*, the court explained its refusal to permit an action for damages by saying: "The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants."

A California case with a discussion of the same point is *Banks v. Housing Authority*, 120 Cal. App.2d 1. It was there held that a housing authority may not discriminate on the basis of race or color in the assignment of eligible applicants to housing projects. The Housing Authority had attempted to restrict occupancy in housing projects to members of the race which predominated in the area in which the housing project was located. The court in speaking of this action said (page 17): "Perhaps a few words should be added concerning appellants' 'neighborhood pattern policy.' They are exercising state power to preserve, perpetuate, and enforce a neighborhood racial pattern wherever they decide to

locate and build a housing project. In some instances that pattern may have been created and maintained, until now, by the very type of restrictive covenants which the state, through its judicial branch, is prohibited from enforcing. (See *Shelley v. Kraemer*, supra, 334 U.S. 1). *What sort of 14th Amendment might it be that would, at the same time, countenance active sponsorship and fostering of such restrictions by the executive branch of the state or local government?*" (Emphasis added.)

[Encouraging Private Discrimination Prohibited]

The above discussed decisions illustrate the point that state action, the practical effect of which is to encourage and foster discrimination by private parties is unconstitutional. *Shelley* and *Barrows* held that not only is discrimination by the state prohibited, but a state may not engage in action which has the effect of actively encouraging continued racial discrimination by private parties. The *Banks* case involved another part of the same program under which redevelopment agencies were created, and in-

dicates that they were not created to encourage or foster racial discrimination by private parties. The rhetorical question asked by the court therein, and set forth above, may be paraphrased here: What sort of a 14th Amendment might it be that would countenance active sponsorship by the redevelopment agency of racial discrimination by private landlords?

In our opinion, the action of redevelopment agencies in servicing listings of landlords who refuse to accept members of minority groups as tenants constitutes state action violative of the equal protection clause of the 14th Amendment. Consequently, redevelopment agencies are obliged to refrain from the practice in question.

Whether such action by a redevelopment agency would also be contrary to "public policy" in California need not be decided. The decisions do, however, indicate the existence of a strong public policy against racial discrimination. See: *James v. Marinship Corp.*, 25 Cal.2d 721; *Thompson v. Moore Drydock Co.*, 27 Cal.2d 595; and *Williams v. Int. etc. of Boilermakers*, 27 Cal.2d 585; but cf. *Reed v. Hollywood Professional Sch.*, 169 A.C.A. Supp. 799.

PUBLIC ACCOMMODATIONS Hotels and Restaurants—Florida

The Florida Attorney General, having been asked by a judicial circuit state's attorney for an opinion as to: (1) whether a restaurant owner could lawfully refuse to serve a guest, guilty of no misconduct, upon determining that rendering the service would injure the reputation of his establishment; (2) whether such guest, if he refused to depart upon request, would be guilty of a misdemeanor under Florida statutes; and (3) whether such guest might thereafter be ejected, forcibly if necessary, by a state law enforcement officer, replied on September 30, 1959, in the affirmative as to all three questions.

Honorable Richard E. Gerstein
State Attorney, Eleventh Judicial
Circuit of Florida, Dade County
Miami 32, Florida

Dear Mr. Gerstein:

This will acknowledge receipt of your letter of September 14, 1959, in which you request an official opinion of this office concerning construction of certain provisions of the law relating to hotels and restaurants. Your questions are as follows:

1. May a restaurant owner lawfully refuse to serve a guest when, for one reason or another, it determines that it would be injurious to the reputation, dignity or standing of the establishment to entertain such guest, even though the guest in question has engaged in no misconduct?
2. Is a guest of a restaurant, who has engaged in no misconduct, guilty of a misdemeanor under Section 509.141(3), Florida Statutes, when he refuses to depart, upon request, from the premises where the management

for one reason or another determines that it would be injurious to the reputation, dignity or standing of the restaurant to entertain such guest?

3. May a guest of a restaurant, who has engaged in no misconduct, be ejected, forcibly if necessary, by a law enforcement officer of this State, when the management of the restaurant, who has determined for one reason or another that it would be injurious to the reputation, dignity or standing of the restaurant to entertain such guest after such guest has been requested to depart from the premises and he has refused to depart?

[Florida Statutes]

Section 509.141, Florida Statutes, relates to the ejection of undesirable guests and provides for notice and procedure for ejection of such persons.

Subsection (1) of Section 509.141, Florida Statutes, gives the manager or person in charge of any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court the right to remove or cause to be removed or ejected from the premises of these establishments any guests who, while in the establishment, or on the premises (1) is intoxicated, immoral, profane, lewd or brawling, (2) who indulges in language or conduct (a) such as to disturb the peace and comfort of other guests of the establishment, or (b) indulges in language or conduct such as to injure the reputation or dignity or standing of the establishment, or (3) who, in the opinion of the management, is a person whom it would be detrimental to such establishment for it any longer to entertain.

Subsection (2) of Section 509.141, Florida Statutes, provides for giving an undesirable guest notice to leave the establishment and subsection (3) makes it a misdemeanor on the part of the person on having been requested to leave to continue to remain on the premise. That section provides specifically as follows:

"And any guest who shall remain or attempt to remain in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor, and shall be deemed to be illegally upon such hotel, apartment house, tourist camp,

motor court, restaurant, rooming house or trailer court premises."

Subsection (4) of Section 509.141, Florida Statutes, provides that if any guest or former guest or other persons shall be illegally upon the premises, that is to say, he has been requested to leave and has disregarded the request, then the management or person in possession and control of the establishment may call to his assistance a law enforcement officer, and upon the request of the hotel, apartment house, restaurant, etc. management it is the duty of the law enforcement officer to forthwith eject, forcibly, if necessary, the person illegally upon the premises of the establishment.

[North Carolina Law]

In the State of North Carolina similar questions arose with respect to a statute which imposed a criminal penalty for interfering with the possession or right of possession of real estate privately held, which statute placed no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The North Carolina statute and the Florida statute, from the legal point of view, are quite similar.

In the case of *State v. Clyburn* (N.C.), 101 S.E.2d 295, seven (7) persons were convicted under the statute imposing criminal penalties for interfering with the possession or right of possession of realty privately held. The case was appealed to the Supreme Court of North Carolina and that court held that refusal of the proprietors of an ice cream and sandwich shop to serve negroes in the portion of the shop reserved for white clientele impaired no rights of the negroes under the Fourteenth Amendment to the Federal Constitution.

This 1958 opinion by the Supreme Court of North Carolina is a well-written and exhaustive study of the questions presented in your request. The Court in that opinion said:

"Our Statutes, G. S. §§ 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. These statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits

his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense.

"The Fourteenth Amendment to the Constitution of the United States created no new privileges. It merely prohibited the abridgement of existing privileges by state action and secured to all citizens the equal protection of the laws.

"Speaking with respect to rights then asserted, comparable to rights presently claimed, Mr. Justice Bradley, in the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 21, 27 L. Ed. 835, after quoting the first section of the Fourteenth Amendment, said: 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are

subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment, but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.'

"In *United States v. Harris*, 106 U. S. 629, 1 S. Ct. 601, 609, 27 L. Ed. 290, the Court quoting from *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588 said:

"The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guaranties, and no more. The power of the national government is limited to this guaranty.'

"More than half a century after these cases were decided the Supreme Court of the United States said in *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161, 3 A. L. R. 2d 441:

"Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'

"This interpretation has not been modified: *Collins v. Hardyman*, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; *District of*

Columbia v. Thompson Co., 346 U. S. 100, 73 S. Ct. 1007, 97 L. Ed. 1480; *Williams v. Yellow Cab Co.*, 3 Cir., 200 F. 2d 302, certiorari denied *Dargan v. Yellow Cab Co.*, 346 U. S. 840, 74 S.Ct. 52, 98 L.Ed 361.

"*Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, presented the right of a corporation, organized under the New York law to provide low cost housing, to select its tenants, with the right to reject on account of race, color, or religion. The New York Court of Appeals affirmed the right of the corporation to select its tenants. The Supreme Court of the United States denied certiorari, 339 U. S. 981, 70 S. Ct. 1019, 94 L. Ed 1385.

"The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. *Madden v. Queens County Jockey Club*, 269 N. Y. 249, 72 N. E. 2d 697, 1 A. L. R. 2d 1160; *Terrell Wells Swimming Pool v. Rodriguez*, Tex. Civ. App., 182 S. W. 2d 824; *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S., 447; *Younger v. Judah*, 111 Mo. 303, 19 S. W. 1109; *Goff v. Savage*, 122 Wash. 194, 210 P. 374; *De La Ysla v. Publix Theatres Corporation*, 82 Utah 598, 26 P. 2d 818; *Brown v. Meyer Sanitary Milk Co.*, 150 Kan. 931, 96 P. 2d 651; *Horn v. Illinois Cent. R. Co.*, 327 Ill. App. 498, 64 N. E. 2d 574; *Coleman v. Middlestaff*, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; *Fletcher v. Coney Island*, 100 Ohio App. 259, 136 N. E. 2d 344; *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. 2d 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants.

"The fact that the proprietors of the ice cream parlor contributed to the support of local government and paid a license or privilege tax which license contained no restrictions as to whom the proprietors could serve cannot be construed to justify a trespass, nor is there merit in the suggestion that the complaint on which the warrant of arrest issued, signed by an officer charged with the duty of enforcing the laws, rather than by the injured party, constituted state action denying privileges guaranteed to the defend-

ants by the Fourteenth Amendment. The crime charged was committed in the presence of the officer and after a respectful request to desist. He had a right to arrest. G. S. § 15-41." (Emphasis supplied.)

[Federal Decisions]

In a 1956 case, *Martin v. Monmouth Park Jockey Club*, 145 F.Supp. 439, affirmed per curiam United States Circuit Court of Appeals for the Third Circuit in an opinion released April 4, 1957, a jockey, Robert J. Martin, attempted to enjoin the Monmouth Park Jockey Club from refusing him permission to ride mounts racing at the said jockey club. The Court said:

"Plaintiff's argument seems to consist of two parts:

(1) the defendant Club as a quasi-public corporation may not arbitrarily exclude him, and (2) his license from the New Jersey Racing Commission, under the Rules of the Commission, gives him a right to ride at any track in the state at which he can secure a mount regardless of the wishes of the owner of the track.

"Neither point has merit. Although it is intensely regulated, the defendant Club is a private organization. Nothing is more elementary than its right as a private corporation to admit or *exclude any persons it pleases* from its private property, absent some definite legal compulsion to the contrary. . . ." (Emphasis supplied.)

In *Williams v. Howard Johnson Restaurant*, decided by the United States Circuit Court of Appeals, Fourth Circuit, July 16, 1959, it was held that a state-licensed restaurant located on an interstate highway violated neither the Fourteenth Amendment nor the Commerce Clause by refusing to serve a negro. The Court referred to the Virginia statute making it unlawful to operate a restaurant in the State without an unrevoked license and said:

"The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment . . . A

restaurant is not engaged in 'interstate commerce merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state. As an instrument of local commerce, the restaurant ... is at liberty to deal with such persons as it may select.'"

See also 10 Am. Jur. 911-917, §§ 18-24; 14 C.J.S. 1165-1170 §§ 7-9.

Predicated expressly upon these current controlling decisions of the Courts cited above

and particularly those emanating from the Federal judiciary construing the Fourteenth Amendment of the United States Constitution, it is our opinion that your questions necessarily must be answered in the affirmative.

Sincerely,

Richard W. Ervin
Attorney General

Prepared by:
George E. Owen
Assistant Attorney General

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